TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~386~~ 173

RICHARD COOPER, EXECUTOR OF SILAS OMOHUNDRO, DECEASED, PLAINTIFF IN ERROR,

vs.

LITTLETON J. OMOHUNDRO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED MAY 17, 1872.

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1 Pleas before the circuit court of the United States for the eastern district of Virginia, at Richmond, in said district, on Wednesday, May 17th, 1871. Present, Hon. Hugh L. Bond, judge, presiding.

Style of suit.

LITTLETON J. OMOHUNDRO, A CITIZEN OF the State of Ohio, pl'tiff,
vs.
RICHARD COOPER, EXECUTOR OF SILAS Omohundro, a citizen of the State of Virginia, d'f't. } In case.

Be it remembered that heretofore, to wit, on the 5th day of March, A. D. 1869, came the plaintiff, by his attorney, and sued out of said court a summons against the defendant, which summons, with the return thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, district of Virginia, ss:

The President of the United States of America to the marshal of the district of Va., greeting:

We command you that you summon Richard Cooper, executor of Silas Omohundro, a citizen of the State of Virginia, if he shall
2 be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the district of Virginia, at rules to be held at the said clerk's office, in the custom-house, in the city of Richmond, in the district aforesaid, on the 1st Monday of April next, to answer unto Littleton J. Omohundro, a citizen of the State of Ohio, in a plea of action on the case, in assumpsit, to his damage, as he alleges, of $10,000 dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 5 day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independence the 93d year.

[SEAL.] W. H. BARRY, *Clerk.*

Return.

I hereby acknowledge legal service of this writ. Mar. 8th, 1869.
D'f't, by his counsel, JAMES LYONS.

And at another day, to wit, at rules held in the clerk's office of
3 said court, on Monday, 5th day of April, 1869:

This day came the plaintiff by his attorney, and filed his declaration against the defendant, which declaration is in the words and figures following, to wit:

Declaration.

In the circuit court of the United States for the district of Virginia.
April rules.

DISTRICT OF VIRGINIA, *to wit:*

Littleton J. Omohundro, a citizen of the State of Ohio, plaintiff, complains of Richard Cooper, executor of Silas Omohundro, a citizen

and inhabitant of the State of Virginia, defendant, (which said Silas Omohundro was also a citizen of the State of Virginia, in his lifetime,) of a plea of trespass on the case, in assumpsit.

For that whereas the said Silas Omohundro, in his lifetime, to wit, on the 1st day of July, 1864, at the city of Cincinnati, Ohio, to wit, at the city of Richmond, Virginia, and within the jurisdiction of this court, was indebted to the said plaintiff in the sum of ten thousand dollars, of lawful money of the United States, for so much of like money
4 before that time lent & advanced to him, the said Silas Omohundro, at his special instance & request, by the said plaintiff. And being so indebted, he, the said Silas Omohundro, in consideration thereof, afterwards, & in his lifetime, to wit, on, &c., at, &c., aforesaid, undertook, & then & there faithfully promised the said plaintiff to pay him the said sum of money when thereunto afterwards requested.

2. And whereas also the said Silas Omohundro, in his lifetime, afterwards, to wit, on the day & year, & within the jurisdiction last aforesaid, at, &c., aforesaid, was indebted to the said plaintiff in the further sum of ten thousand dollars, of like lawful money, for so much of such money by the said plaintiff before that time paid, laid out & expended, to & for the use of him the said Silas Omohundro, and at his special instance & request. And being so indebted, he, the said Silas Omohundro, in consideration thereof, afterwards, & in his lifetime, to wit, on, &c., at, &c., aforesaid, undertook & faithfully promised the said plaintiff to pay him the said sum of money, when thereunto afterwards requested.

5 3. And whereas also the said Silas Omohundro, in his lifetime, afterwards, to wit, on the day & year aforesaid, at, &c., & within the jurisdiction aforesaid, accounted with the said plaintiff of & concerning divers other sums of money from him the said Silas Omohundro to the said plaintiff before that time due & owing & then in arrears & unpaid, & upon such accounting the said Silas Omohundro was then & there found to be in arrear & indebted to the plaintiff in the further sum of ten thousand dollars of like lawful money of the U. S., & being so found in arrear & indebted, he, the said Silas Omohundro, in his lifetime, in consideration thereof, then & there undertook & faithfully promised to pay the said sum of money to the plaintiff when thereunto afterwards requested. Yet the said Silas Omohundro, in his lifetime, and the said Richard Cooper, executor, the defendant, since the death of the said Silas Omohundro, not regarding the promises of said Silas Omohundro have not nor hath either of them as yet paid the several sums of money or either of them, or any part thereof, to the said plaintiff, though often requested so to do. But to pay the same to the said
6 plaintiff he the said Silas Omohundro in his lifetime, & he the said defendant since his death have hitherto wholly failed & refused & still refuse, to the damage of the plaintiff ten thousand dollars, & therefor he brings suit.

CRUMP, *P. Q.*

Bill of particulars.

Richard Cooper, Ex'r of Silas Omohundro, to Littleton J. Omohundro, Dr.

1862, April 1.	To money advanced & paid to Louisa Omohundro, at the request of Silas Omohundro, to date.	$1,200
1863, April 1.	To money advanced & paid as above for year ending this day.....	$1,200

1864, April 1.	To money advanced & paid as above for year ending this day.....	$1,200
1864, June 24.	To money advanced & paid as above from April 1, '64, to this date.....	$300
	To interest on the respective sums from their several dates.....	$
1861, Dec. 9th.	To money paid as above to W. H. Brown.....	$491

7 These sums were advanced by L. J. Omohundro to the said Louisa Omohundro, in Cincinnati, Ohio, to pay the expenses of her living & in part for the building of a house for her by W. H. Brown, employed by S. Omohundro for that purpose, & all at the special request of the said Silas Omohundro in his lifetime.

RECAPITULATION OF ACC'T.

$1,200	with	int.	from	April	1,	'62.
$1,200	"	"	"	"	"	'63.
$1,200	"	"	"	"	"	'64.
$300	"	"	"	June	24th,	'64.
$491	"	"	"	Dec'b'r	9th,	'61.

Common order.

Thereupon, the defendant not appearing, it is ordered that judgment be entered against said defendant for the damages said plaintiff hath sustained by the non-performance by the defendant of the promise and assumption in the declaration mentioned, unless said defendant shall appear and plead to issue at the next rules.

And at another day, to wit, at rules held as aforesaid on Monday, the 26th day of April, A. D. 1869.

Common order conf'd.

8 This day came again the plaintiff, by his attorney, and the defendant not appearing it is ordered that the plaintiff's damages be ascertained by a jury, at the next term.

And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at the court-room thereof in the city of Richmond, in said district, on Monday, the 17th day of May, 1869.

Non-assumpsit.

This day came the defendant, by his attorney, and pleaded non-assumpsit. and put himself upon the country, and the plaintiff likewise. Whereupon it is ordered that the judgment obtained at rules against said defendant be set aside.

And at another day, to wit, on Wednesday, May 10th, 1871.

Plea & replication filed.

This case having been submitted to the court by stipulation of counsel, the defendant filed a plea in writing, and the plaintiff his replication

thereto; thereupon, the evidence and argument being fully heard, the court takes time to consider.

Plea.

9 And the said d'f't says that the pl't'ff ought not to have or maintain his action aforesaid against him, because, he says, that at the time of making the supposed contract and promise in the declaration mentioned, war existed between the United States of America and the Confederate States of America, and the pl't'ff and the testator of the d'f't were alien enemies, and this he is ready to verify. Wherefore he prays judgment, &c.

Replication.

And the said plaintiff, in reply to the special plea of the defendant, denies the allegations thereof, & prays that the same may be enquired of by the country.

And now, at this day, to wit, on Wednesday, May 17th, 1871.

Judgment.

This cause having been submitted to the court for its determination and judgment without the intervention of a jury, the court does find the facts in the case for the plaintiff, and gives judgment that the plaintiff recover of the defendant the sum of four thousand three hundred and ninety-one dollars, with interest from the 24th day of June, eighteen hundred and sixty-four, at the rate of six per cent. per annum,
10 and costs to be levied of the goods and chattels of the decedent in the hands of the defendant to be administered.

HUGH L. BOND, *Judge, &c.*

Exceptions noted.

MEMO.—To the opinions of the court, given upon the trial of this case, against the defendant, he, by his counsel, excepted, and tendered his bill of exceptions, which is received, signed, and sealed by the court, and ordered to be made a part of the record in this cause.

Bill of exceptions.

This day came the parties, by their counsel, and entered into the following agreement in writing:

Stipulations.

It is agreed by the counsel for the plaintiff and for the defendant in this cause, that a trial by jury be dispensed with, and that the whole case, upon the facts thereof, be heard & determined by the court.
March 10, '71.

W'M H. CRUMP, *for Plaintiff.*
JAMES LYONS, *for the D'f't's.*

Thereupon the plaintiff, to sustain the issue joined on his part, offered the following testimony, to wit, the depositions of Adam N. Riddle, Warren H. Brown, and Sydney Omohundro.

11 UNITED STATES OF AMERICA,
District of Virginia, ss:

The President of the United States of America to S. S. Carpenter, esq., United States commissioner for the southern district of Ohio, Cincinnati, Ohio, greeting:

We, reposing special confidence in your fidelity and provident circumspection, do hereby authorize and appoint you to take the testimony, in writing, of Adam N. Riddle Warren H Brown, whom you are hereby authorized and required to bring before you at such time and place as you may designate and appoint for that purpose, and that at such time and place you will proceed to examine, under oath, said witnesses, at the instance of the plaintiff in a certain cause now pending and undetermined in our circuit court of the United States for the district of Virginia, before the judge thereof, wherein Littleton J. Omohundro is plaintiff, and Richard Cooper, executor of Silas Omohundro, dec'd, is defendant. The answers of the witness you will cause to be reduced to writing in the order in which they shall be answered, and shall then be signed by said witness . At the foot thereof you will add a certificate, subscribed by yourself, stating that it was sworn to and subscribed by said witnesses, and the time and place when and where the same were taken; which said examination of said witness , so taken, with your certificate thereto attached, you will send directed to our clerk of our circuit court of the United States for the district of Virginia, sealed, with the names of the parties litigent endorsed thereupon, with early dispatch, together with this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond, Virginia, this 12th day of April, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independence the 93d.

[SEAL.] W. H. BARRY, *Clerk.*

CINCINNATI, OHIO, *April 29th*, 1869.

The execution of the above commission appears by the schedule hereunto annexed.

S. S. CARPENTER, [SEAL.]
U. S. Commissioner S. Dist. Ohio.

12

13 *Depositions of Adam N. Riddle, Warren H. Brown, & Sydney Omohundro.*

In the circuit court of the United States, district of Virginia, ss:

LITTLETON J. OMOHUNDRO, PL'FF,
ag'st
RICHARD COOPER, EXECUTOR OF SILAS OMOhundro, deceased, def't.

SOUTHERN DISTRICT OF OHIO,
City of Cincinnati, ss:

Littleton J. Omohundro, being duly sworn, says that he is the plaintiff in the above-named case; that he is advised and verily believes that the testimony of Adam N. Riddle, Warren H. Brown, and Sidney Omohundro is material and necessary for him in said cause; that said wit-

nesses all reside in the city of Cincinnati, in the State of Ohio, more than one hundred miles from Richmond, in the State of Virginia, where the court in which the said cause is to be tried is to be held; and that said defendant and his attorney both reside in the State of Virginia, more than one hundred miles from Cincinnati, Ohio.

LITTLETON J. OMOHUNDRO.

14 Sworn to and subscribed before me this 28th day of April, A D. 1869.

S. S. CARPENTER, [SEAL.]

United States Commissioner for the Southern District of Ohio.

Deposition of Warren H. Brown, Adam N. Riddle, and Sidney Omohundro, taken before me, Samuel S. Carpenter, United States commissioner in and for the southern district of Ohio, at Cincinnati, Ohio, duly appointed by the circuit court of the United States for the sixth circuit and district aforesaid, commencing the 28th day of April, A. D. 1869, at my office, No. 21, West-Third street, in Cincinnati, in the State of Ohio, between the hours of 9 o'clock a. m. and 6 o'clock p. m. of said day, to be read in evidence on behalf of the plaintiff in a cause pending in the circuit court of the United States for the district of Virginia, wherein Littleton J. Omohundro is plaintiff, & Richard Cooper, executor of Silas Omohundro, deceased, is defendant. Taken in pursuance of the annexed commission and notice, and of the affidavit of the plaintiff prefixed; by which it appears to my satisfaction that said witnesses all reside more than one hundred miles
15 from Richmond, Virginia, where the said court is appointed by law to be held; and that the said defendant and his counsel both reside more than one hundred miles from Cincinnati, Ohio, where said depositions are taken.

The plaintiff appeared in person; neither defendant nor counsel appeared.

The said WARREN H. BROWN, of lawful age, being then and there produced by the plaintiff, and being carefully examined and cautioned to testify the truth, the whole truth, and nothing but the truth, deposes and says:

1st question by the plaintiff. State your name, age, residence, and occupation.

Answer. My name is Warren H. Brown. I reside at No. 269 West-Seventh street, in the city of Cincinnati, in the State of Ohio. I am sixty-three years old. I am a carpenter and builder.

2d question by same. State whether you are acquainted with the parties to this suit; and, if so, how long and where have you known them?

Answer. I am acquainted with the plaintiff, and have known him since the year 1841, at Cincinnati, Ohio. I am not acquainted with
16 the defendant, Richard Cooper, executor. I have seen him once or twice, but formed no acquaintance with him.

3d ques. by same. State whether you were acquainted with the late Silas Omohundro, deceased, in his lifetime, and how long, and where?

Answer. I was acquainted with him from the year 1841 (about which time he came to Cincinnati) until the time of his decease. He first came here on a visit.

4th question by same. State where said Silas Omohundro resided at the time of his decease; and for what time previous had he resided there?

Answer. He resided at that time at Richmond, Virginia, and had been residing there ever since I knew him in 1841. He visited Cincinnati once a year regularly until the war broke out, after which all communication was stopped.

5th question by same. State whether you were acquainted with the late Louisa Omohundro and her family? If so, state who composed that family, and what relations they sustained, if any, to said Silas Omohundro, and how said family was supported, and by whom, if you know.

17 Answer. In the year 1841 (I think it was) said Silas Omohundro came to Cincinnati, and brought Louisa Omohundro with him, and her children, and always supported them afterwards; paid all their bills and all their family expenses. Said Louisa's relation towards him, so far as I could see, was that of his wife. He always spoke to me and wrote to me in his letters about said Louisa and her children as his family, & as such requested me to do things for them. He acknowledged the children to be his, and always expressed his intention to do a good part by them and leave them an ample provision at his death. He had two children when he first brought his family here, & had four or five children by said Louisa afterwards. When he came to Cincinnati he generally stayed about two weeks with his family. Mrs. Omohundro was a person of excellent character, and it was generally believed that she was his wife—which was my own opinion.

6th question by same. State what you know, if anything, about the claim of the plaintiff in this case for the item of December 9th, 1861, of $490; amount paid Warren H. Brown on account of building a house. (See Exhibit (A,) hereto annexed.)

18 Answer. I received said amount of four hundred and ninety dollars from Littleton J. Omohundro, the plaintiff in this action. Mr. Silas Omohundro employed me to build a house for the use of his family. He employed me in the year 1861. I built the house and finished it all complete; but before he had paid me all that was coming to me the war stopped communication with this place. In his last letter he requested me to call on the plaintiff, his son, Littleton J. Omohundro, for the balance coming to me. I did so, and he paid me the $490 item in the account which is now shown me, marked A, and annexed to these depositions. The papers marked (B) & (C,) hereto annexed, are receipts given by me to the plaintiff for said $490. The notes described in said receipts have been paid.

7th question by same. State, if you know, what would be a reasonable sum of money for the support of such a family as Mr. Omohundro's, in Cincinnati, in the years 1862, 1863, and 1864.

Answer. I should think twelve hundred dollars would be very low for that purpose, considering the expense of living here at that time.

8th question by same. State whether Silas Omohundro's said

19 family had any other means of subsistence than such as were supplied by him.

Answer. No; they had not.

9th ques. by same. Look at the letters marked (D,) (E,) & (F,) now shown to you, and state in whose handwriting they are.

Answer. I have looked at said letters. (D) & (E) are written to myself, and (F) to L. J. Omohundro, the plaintiff, and are in the handwriting of Silas Omohundro above named.

10th qu. by same. State whether you saw a letter from said Silas Omohundro, to the plaintiff, dated on or about April 28th, 1861, and which contained words as follows, or to the same effect: "You all must

arrange matters the best way you can, as I cannot help myself, but will foot all bills as soon as it is in my power to do so," & what was done in consequence of such letter.

Answer. Yes; I saw that letter. Plaintiff showed me that letter, and I showed him letters received by me, and on conferring together it was determined that I should go on and finish the building, and that plaintiff should pay me whatever money his father might be unable to get through to me.

WARREN H. BROWN.

S. S. CARPENTER, *U. S. Comm'r, S. D. O.*

20 Being unable to complete the examination of witnesses to-day, the same is hereby adjourned until to-morrow, April 29th, 1869, at the same place and between same hours.

S. S. CARPENTER, [SEAL.]
U. S. Comm'r, S. D. O.

APRIL 29TH, 1869.—Pursuant to adjournment, and at the time and place specified in said adjournment, and in the notice hereto attached, the examination of witnesses under the annexed commission & notice is resumed, and the said ADAM N. RIDDLE, named in the caption, then and there being produced, and being of lawful age, and carefully examined and cautioned, and duly affirmed to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows, viz:

1st question by the plaintiff. State your name, age, residence, and occupation; and whether you are acquainted with the parties to this suit; and whether you knew Silas Omohundro and Louisa Omohundro (now deceased) in their lifetime; and where and how long you knew or have known such persons.

21 Answer. My name is Adam N. Riddle. I am sixty-three years old. I reside at M't Auburn, in the city of Cincinnati, in the State of Ohio. I am an attorney at law, and have been since the year 1830. I am acquainted with the plaintiff, Littleton J. Omohundro. I have been acquainted with him ten or fifteen years, at Cincinnati. I do not know the defendant in this case. I knew Silas Omohundro in his lifetime. I became acquainted with him in 1841, at Cincinnati, Ohio. I have seen Louisa Omohundro, from time to time, as far back as fifteen or twenty years, but had no acquaintance with her, only to know that she was the wife of Silas Omohundro, as I was informed by Silas Omohundro himself.

2d question by same. State where Silas Omohundro resided at the time of his decease, and how long had he resided there, and how often he visited his family at Cincinnati; who composed that family, and how and by whom they were supported.

Answer. Silas Omohundro, at the time of his decease, resided in Richmond, Virginia, and had been residing there since, and, as he informed prior to my acquaintance with him. He visited his family, at Cincinnati, from 1841 to 1860, as often as once a year,

22 and remained with his family at such times a week or two. His family was composed of his wife Louisa and three children, whom I knew personally, & I am under the impression that there were other children. His family was supported by himself, as I understood him, by means furnished from time to time by him.

3d question by same. State what you know, if anything, of means supplied by the plaintiff for the support of the family of Silas Omohundro.

Answer. I know that, for the purpose of raising money to pay Mr. Warren H. Brown a balance due him on the building of a house for the benefit of Mr. Omohundro's family, & for raising means to support said family, after communication was suspended by the war in 1861, the plaintiff sold a bond and mortgage for $2,500, in which he had money invested at ten per cent. This was in pursuance of directions given him in a letter from his father.

4th question by same. State whether $1,200 a year, in the years 1861, 1862, 1863, and 1864, was a reasonable sum for the support of Mr. Omohundro's family at Cincinnati.

23 Answer. It was. It would require strict economy to live on that sum.

5th question by same. When did Louisa Omohundro first come to Cincinnati with the children; and state all you know of her coming there.

Answer. Silas Omohundro brought her and the children to Cincinnati in 1841, as I was informed by him.

6th question by same. What relation did you sustain towards Silas Omohundro?

Answer. I was his attorney and friend to the time of his death.

7th question by same. In your answer to question 3d, you speak of directions given plaintiff in a letter from his father. State as fully as you can what those directions were, and what plaintiff did in pursuance of them.

Answer. The directions were to afford a support to his mother & the family, as it was impossible for him to transmit funds, as the war suspended communication; and that he would refund his advances as soon as he could; and he, plaintiff, accordingly advised with me about

24 it, and the result was that he sold his securities to raise money for that purpose, as I have above stated.

ADAM N. RIDDLE.

Attest:
S. S. CARPENTER,
U. S. Comm'r, S. D. O.

And, at the same time and place, also appeared SIDNEY OMOHUNDRO, named in the caption, and he, being of lawful age, and carefully examined and cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows, viz:

1st question by the plaintiff in person. State your name, age, residence, and occupation; and whether you are acquainted with the parties to this suit; and, if so, how long. State also whether you were acquainted with the late Silas Omohundro & Louisa Omohundro, his wife; and, if so, state what relation, if any, you sustained towards them.

Answer. My name is Sidney Omohundro. I am twenty-six years old. I reside in Cincinnati, in the State of Ohio. I am a book-keeper. I am acquainted with the plaintiff, Littleton J. Omohundro, and have been, as far back as I can recollect. He is my brother. I am not acquainted with Richard Cooper, the defendant in this case. I knew said Silas &

25 Louisa Omohundro in their life-time. They were my parents.

2d ques. by same. Where did your parents reside?

Answer. My mother, Louisa Omohundro, resided here in Cincinnati, and my father in Richmond, Virginia.

3d ques. by same. What family had your parents here in Cincinnati? How long did the family reside here? What part of the tine did your father spend with his family? Who supported the family? State all the circumstances fully.

Answer. My father and mother came here (to Cincinnati) in the year 1841, with two children. There were four more children born in the family in Cincinnati, making six in all. The family contiued to reside here all the time after their arrival. My father visited his family here once a year, and remained about a week each time. The family was supported by my father either by remittances of money or the payment of all debts incurred for their support, when he visited them. This continued until the breaking out of the war in 1861. One of my sisters was married in May, 1852, and from that time was supported by her husband.

After the breaking out of the war the family was supported by
26 my brother, the plaintiff in this case, in pursuance of the request of my father in letters to the plaintiff, which letters I saw. In order to raise money to support the family and pay for the schooling of the children, my said brother sold securities in which he had invested money to the amount, I think, of twenty-five hundred dollars. He always sacrificed his own interests to keep his mother, and brothers, and sisters free from want.

4th ques. by same. Look at the account now shown you, marked (A) *now shown you*, and state what you know, if anything, about it?

Answer. I have looked at said paper (A) now shown to me. I know that the items of April 1st, 1862, April 1st, 1863, April 1st, 1864, and June 25th, 1864. for $3,900 in all, are correct, and that those amounts were paid by the plaintiff to Louisa Omohundro, for the support of herself and family. I was living with the family during the whole of that time.

5th ques. by same. Look at the papers now shown to you, marked (H,) (I,) (K,) & (L,) and state in whose handwriting is the signatures of "Louisa Omohundro" to said papers, and how the same came to be made.

27 Answer. I have looked at said papers marked (H,) (I,) (K,) & (L.) The signatures to said papers are in the handwriting of my sister Martha, and were writen by her at my mother's request. This sister did all my mother's writing for her, she being a poor writer.

6th qu. by same. State whether $1,200 was a reasonable sum for the suxport of the family yearly from April 1st, 1861.

Answer. It was a very reasonable sum and required very strict economy to live on.

SIDNEY OMOHUNDRO.

Attest:

S. S. CARPENTER,
U. S. Comm'r, S. D. O.

I further certify that said depositions were reduced to writing by me in the presence of said deponents, and by them subscribed in my presence; that I am not of counsel or attorney to either of the parties in said cause, nor interested in the event thereof; and that said depositions were taken, sworn or affirmed to and subscribed by the witnesses on the 28th & 29th days of April, 1869, at my office at No. 21 West Third street, in the city of Cincinnati, in the State of Ohio, between the hours of 9 o'clock a. m. and 6 o'clock p. m. of said days, pursuant to the
28 annexed notice.

Witness my hand and seal the 29th day of April, 1869.

SAM'L S. CARPENTER. [SEAL.]
U. S. Commissioner in and for the Southern District of Ohio.

Fees $10.00, paid by the pl'ff.

S. S. CARPENTER.

RICHARD COOPER,
Executor of Silas Omohundro:

SIR: Take notice that on the 28th day of April, 1869, I shall proceed, at the office of S. S. Carpenter, United States Commissioner for the southern district of Ohio, No. 21 West Third street, Cincinnati, in the State of Ohio, between the hours of 9 o'clock a. m. and 6 p. m., to take the depositions of Adam N. Riddle & Warren M. Brown, to be read in evidence in a cause depending in the circuit court of the United States for the district of Virginia, wherein you are defendant & I am plaintiff. And if from any cause the taking of said depositions should not be commenced on that day, or being commenced should not be completed, the taking of the same will be adjourned from day to day, at the same
29 place and between the same hours, until finished.

LITTLETON J. OMOHUNDRO,
By Counsel.

APRIL 13, '69.

Service of the within notice acknowledged.

RICHARD COOPER,
Ex'r of S. Omohundro.
By JAMES LYONS,
His Counsel.

EXHIBIT A.

CINCINNATI, OHIO, *April* 28, 1869.

Mr Silas Omohundsor, Richmond, Va., to Littleton J. Omohundso, Dr.

To sundry amounts paid by direction of Silas Omohundso as follows, viz:

1861.		
Dec. 9.	To am't paid Warren H. Brown on ac't of building house	$490 00
1862.		
April 1.	To am't paid Louisa Omohundso for support of herself and children	$1,200 00
1863.		
April 1.	To am't paid Louisa Omohundso for support of herself and children	$1,200 00
30 1864.		
April 1.	To am't paid Louisa Omohundso for support of herself and children	$1,200 00
1864.		
June 25.	To am't paid Louisa Omohundso for support of herself and children	$300 00
		$4,390 00

(Marked:) W. H. Brown, Sidney Omohundso. Attest: S. S. Carpenter, U. S. com'r, S. D. O.

EXHIBIT B.

Received, Cincinnaty, December 9th, 1861, of Littleton I. Omohundso, his note for two hundred dollars at twelve months after date, with interest, said note being in full for contract of building dwelling-house for four thousand two hundred dollars, with Silas Omohundso.

WARREN H. BROWN.

EXHIBIT "C."

Received, Cincinnati, Dec. 9, 1861, of Littleton I. Omohundso, two hundred and ninety dollars, being in full for all extra work done on dwelling-house on Smith street, between fourth fifth street.

WARREN H. BROWN.

(Marked:) W. H. Brown. Attest: S. S. Carpenter, U. S. com'r. S. D. O.

31 EXHIBIT "D."

(Marked:) W. H. Brown. Attest: S. S. Carpenter, U. S. comm'r, S. D. O.

RICHMOND, VA., *April* 27, 1861.

W. H. BROWN, Esqr:

FRIEND BROWN—DEAR SIR: This leaves me as well as usual. I received your letter this evening by Adams Express Company, of date 22d April. I wrote to you a week or 10 days ago. I also wrote to Littleton on 23d inst. to say to you to stop the building as I could not pay you for it, although I had $16,000 h*ear* in bank; and I received another letter from him yesterday and answered it by mail 26th inst. I wrote to Littleton to show you the letter. The facts are these, as I wrote to him: I want the house finished, as Louisa is paying rent. Last June when I was in your city I gave Littleton $2,500, which he has had at 10 per cent ever since, through the management of Mr. A. V. Riddle. I wrote to him yesterday if he could collect his money or a part of it to pay you $1,000 the first of May and $1,000 the first of June, to do so and I would pay him 10 p'r cent. and he pay you and you go on with the house, as I want it finished to save the expense of rent. Mr. Brown, since I received your letter this evening I find I can buy a check on New York from one
32 of our bankers at 6 p'r cent. and you say it is worth 3 per cent. and on upward tendency. I shall send to Mr. A. V. Riddle, by Monday's mail, by way of Nashville, duplicate for $2,000 and will send the original for $2,000 by Adams Express Co. this evening, with this letter. As soon as you receive this please call and see Mr. Riddle, and also say to Littleton not to interrupt his own money on my account, as you say if I will pay you $2,000, $1,000, the first May and one first June, you will go on and finish the house complete and let my family move into it and wait with me for the balance until I can arrange to pay it, as I now have $18,550 in bank. Yours as ever. Show this to Littleton & Mr. Riddle if you choose.

SILAS OMOHUNDSO.

EXHIBIT "E."

(Marked:) W. H. Brown. Attest: S. S. Carpenter, U. S. com'r. S. D. O.

RICHMOND, VA., *July 2d*, 1861.

FRIEND BROWN:

DEAR SIR: This leaves me well and in good health. My health has been improving ever since about 20th May. As

soon as the weather became more settled my health began to improve. I received one letter from Littleton yesterday,
33 July 1st, dated June 22d. I also received two letters from you this morning, one dated 23d and the other 26 June, all 3 letters by Adams Express Co. I have never received any letter from Mr. Riddle since he receipted to me for the two-thousand-dollar check I sent him. I have written to him, yourself, & Littleton 3 or 4 times, but don't expect either of you have ever received my letters, owing to the stoppage of mails between the States, *accept* I see from your last letter you had just received one of my letters dated 9th June. *Which* I was truly glad to hear you had received that one, and I am very much oblige' to you for showing it to Littleton & the rest of the family, as it is only now by accident we hear from each other. I have never heard from my friend Mr. Murphy, at Lexington, who owes me the money I wrote to you about, since I wrote to him about the 10 or 12 of June, but I suppose he never received my letter or I his in answer. Mr. Brown, I am very glad to hear you are getting along with the house so well, but I am truly sorry to say to you, unless, I can get Littleton, between *him* & Mr. Riddle, to arrange so as to let you have one thousand dollars I don't know of *no* other chance for me to pay you, unless Mr. Murphy, of Lexington, Ky., will pay me the rise of $1400, *he is* due me, and if so I could pay you all I
34 owe you from them two sources. Mr. Brown, it is useless for me to promise or to hold out any idea to you for me to pay you from he*ar*, as you know I would if I could. I assure you I cannot now get exchange here on New York and Philadelphia on *no* terms whatever. I shall write to Littleton on the subject to-day, and if you and *him* receive my letters I hope he will be able to arrange his matters, or by Mr. Riddle's advice, so as to let you have one thousand dollars and (or) I hope Murphy may pay me, and if so it will enable me to squa*ir* off with you, with Littleton's assistance, as I will make it all *write* with him as soon as the times will admit, as I am very anxious for the house to be done, so as to save rent, and you know I am as anxious to pay you as you are to receive it, if it was in my power to do so. I am now truly sorry I did not send Mr. Riddle a check for $4,000 instead of $2,000.00, but at the time I had no idea of such a state of our country as now exist'; but I hope when the error is seen it will be stopped. Please give my respects to Littleton. I have written to him to-day by express, in answer to his letter yesterday. Please give my best regards to Mr. A. V. Riddle and say to him I have written to him 3 or 4 times, but I suppose he
35 has never received my letters. My best for yourself*s* and family, hoping you will receive this letter.

Yours truly, as ever,

SILAS OMOHUNDRO.

I have to direct this letter to you at Lexington, Ky., as I cannot mail one from he*ar* to Cincinnati.

EXHIBIT "F."

(Marked:) W. H. Brown. Attest: S. S. Carpenter, U. S. comm'r, S. D. O.

RICHMOND, VA., *Aug.* 1, 1861.

MY DEAR SON: This leaves me as well and in as fine health as us'al, as I hope it will find you, your mother, & all.

Received your last letter on 12 July and I answered it on 20 July. I was waiting to hear from my friend Murphy at Lexington before I wrote to you. I have not heard from you or Mr. Brown since. I have this

day obtained a check on New York for $2,000, two thousand dollars, and enclosed it to Mr. A. V. Riddle, to pay Mr. W. H. Brown $1,000, and the balance when he finished the house complete, unless you had made arrangements to pay Mr. Brown $1,000, and, if so, to return you all the money you had advanced to Mr. Brown for me. I had to pay 7½ per cent. premium on this $2,000 check, $150 prem., $120 on the other.
36 I have done everything I could do to pay Mr. Brown, as I want your mother and family to move in the house as soon as it is finished and safe to do so, so as to save as much rent as possible. I tried to get a check for $500 more to send your mother to live on, but I could not do it; you must try and let her have till I can send it to her as I know she kneeds money to live on and to pay her taxes this fall. I should of enclosed the $2,000 check to you instead of Mr. Riddle without troubbling of him, but it is such difficul' times about money matters and sending letters I tho't it would be safer to send it to him as he is a vary prominent man in business and he would have no difficulty in disposing of the check, if he and you have the good luck to receive these letters.

Give my respects to Mr. Brown and tell him I have sent him the money as soon as I could, and I hope he will now soon have the house done so you can all move into it and save the rent of another house. Give my love to your mother, brother, and sisters, and accept the same for yourself.

Your affectionate father,

SILAS OMOHUNDAS.

EXHIBIT H.

Received, Cincinnati, O., April 1, 1862, of Littleton J. Omohundso, twelve hundred dollars, money advanced by him on account of
37 Silas Omohundso, for support of myself and children, in accordance with request of Silas Omohundso contained in his letter of date April 28th, 1861, and May 9, 1861.

LOUISA OMOHUNDSO.

$1,200.00.]

(Marked:) Sidney Omohundso. Attest: S. S. Carpenter, U. S. com'r, S. D. O.

EXHIBIT "I."

Received, Cincinnati, O., April 1st, 1863, of Littleton J. Omohundso, twelve hundred dollars, money advanced by him on ac. of Silas Omohundso for support of myself and children, in accordance with request of Silas Omohundso, contained in his letters of April 28th, 1861, and May 9th, 1861.

$1,200$\frac{00}{100}$.] LOUISA OMOHUNDRO.

(Marked:) Sidney Omohundro. Attest: S. S. Carpenter, U. S. com'r, S. D. O.

EXHIBIT "K."

Received, Cincinnati, O., April 1, 1864, of Littleton J. Omohundro, twelve hundred dollars, money advanced by him on ac. of Silas
38 Omohundro for support of myself and children, in accordance with request of Silas Omohundro, contained in his letters of April 28 1861, and May 9, 1861.

$1,200.00.] LOUISA OMOHUNDRO.

(Marked :) Sidney Omohundro. Attest: S. S. Carpenter, U. S. com'r, S. D. O.

EXHIBIT "L."

Received, Cincinnati, O., June 25, 1864, of Littleton J. Omohundro three hundred dollars, money advanced by him on ac. of Silas Omohundso for support of myself and children, in accordance with request of Silas Omohundso contained in his letters of April 28, 1861, and May 9, 1861.

$300.] LOUISA OMOHUNDRO.

(Marked :) Sidney Omohundro. Attest: S. S. Carpenter, U. S. comm'r, S. D. O.

And the following six letters of April 10, April 26, April 28, May 9, July 2d, and July 20, 1861, and receipts:

Letter.

RICHMOND, VA., *April 10th*, 1861.

MY DEAR SON: I have been vary sick for nearly 3 weeks, but
39 I am now getting better, so that I can write, but cannot go out as the we'ther is so bad; it has been raining here for five days & knights, and still at it; the whole country is flooded with water. I received a letter from Mr. Brown several days ago stating the lot was only 86 feet deep, and he expected to have to leave off the summer kitchen, and if so it cannot be hope', and it will cost that much less, and it now does appear we will have war at last; and if so, it will be a vary hard time on me, about building, but Mr. Brown has now progressed too fair to turn back, so he must go ahead.

Give my love to your mother, brother, and sisters. My respects to Mr. Brown. Your affectionate father,

SILAS OMOHUNDRO.

Letter.

RICHMOND, VA., *April* 26, 1861.

MY DEAR SON: This leaves me as well as usual, and in *improveing* in strength every day. We have b'utiful we'ther here for the last week. I wrote to your mother several days ago. I also received your letter of 19th inst., and answered it on 23d inst. I also received your letter of 22d inst. this morning. Littleton, I wrote to you in my last letter, to
40 say to Mr. Brown he must stop the house, as I can't pay him with too much risk and loss more than I could stand. You mention in your letter this morning, it would be best to have the house finished, if possible, as you all *was* paying rent for another. You are right in that. I know it is best to have the house finished, and I do not know but one way it can be done, and that is this: You have $2,500 at 10 p'r cent. interest; now, if you will see Mr. Riddle and can collect your money so as to pay Mr. Brown $1,000 in May, and $1,000 in June, and $500 in July or August, as he progresses with the house, I pay you the same interest you are getting, or will pay the same interest to Mr. Riddle, if he can arrange it for me, as I know Mr. Brown is not able to go on and build the house unless I can advance him money as

he advances the building of the house, and it will not cost me any more to pay you or Mr. Riddle 10 p'r c't, than it will for me to pay house-rent., so I want you to try and arrange it that way, if possible, as I would like very much to have the house finished, if possible. You can show this letter to Mr. Riddle & Mr. Brown, if necessary, and if you can get your $2,500, and I can collect a little upwards of $1,400 that is due me from Mr. F. G. Murphy, of Lexington, K'y, and he has written to me he thinks he can pay me in June or July, and if so, with that and
41 your $2,500, it will enable me to pay Mr. Brown for building the whole house, and I will return you your money with ten p'r cent. interest as soon as I can, as I now have $18,5050, to my credit in Farmer's Bank of Va., and I don't owe a dollar to *no* one in the world, *accept* a few little grocer-bills that I pay every quarter. Give my love to my mother, brother, and sister, & respects to Mr. Riddle & Mr. Brown. Write soon, and let me know what arrangements you make.

Your affectionate pa,

SILAS OMOHUNDRO.

Letter.

RICHMOND, *April* 28, 1861.

MY DEAR SON: This leaves me as well as us'al. I received and answered your letter on 26th, day before yesterday. I wrote to you to try to collect in your money and pay Mr. Brown $1,000 the first of June, and I would pay you the same p'r cent., but now I don't wish you to do so, as I received a letter yesterday evening from Mr. Brown, saying if I could arrange to pay him $2,000, one the first of May and one the first of June, he would go on and finish the house and wait on me until I could pay him the balance on better terms; and on receipt of his letter by Adams & Co.' Express last evening, I called on
42 one of our bankers, or brokers we call them hear, and he give me a check on New York, at 6 p'r cent. prem., for $2,000, which check I enclosed to Mr. A. V. Riddle, as I thought he was better known to banks and brokers than you ware, and I directed him to sell check for the highest price he can get and pay Mr. W. H. Brown $1,000, and pay him *one* $1,000 more the first of June, as I want Mr. Brown to finish the house as soon as possible, to save rent. And if so I can't send any more money shortly, I want you to try and arrange to let your mother have some money to pay her house-rent & to live on, as you *you* and Mr. Riddle and Mr. Brown all know how difficult it is for me to send money to you now, and hard to even send you a letter, as all mails have been stopped between here and the North since 19 of April. You must all arrange matters the best way you can, as I cannot help myself, but will foot all bills as soon as it is in my power to do so. I only got this $2,000 check from a banker who is a particular friend of mine; had it not *of* been for that I could not *of* got it on *no* terms, as when our mails was stopped between hear & Philadelphia and New York, exchange was selling at 10 to 12 p'r cent. prem. I send you this letter by way of Memphis, Tenn. My love to your mother and
43 all of my dear children. Write often.

Your affectionate father,

SILAS OMOHUNDRO.

(Written on the margin:) I sent Mr. Riddle check for $2,000 last evening by Adams Express Co.

Letter.

RICHMOND, VA., *May 9th*, 1861.

DEAR LOUISA: I received your letter of date 1st of May on 6th, and I am glad to hear you are all well, but sorry I can't say as much for myself. I am very *on*well, and have been so much so I had to take medicine again, although I have not been confined to the house or bed; every sudden change of we'ther affects me greatly. We have 2 or 3 heavy white frost hear for the last week. Those sudden changes in the spring & fall always lay me up sick, but as soon as the we'ther becomes warm or cold I enjoy very good health. I never enjoyed better health in my life than I did from 25 of last October to 20 March, and since then I have been sick and *on*well all the time, but I hope, as the spring advances, and the weather is now getting warmer, I hope we will have less changes and my health will get better. You mention your money is out, and you had to borrow from Littleton. I am glad that you are in as good situation as that, as I cannot now get a check on *none* of the northern citys on *no* terms; so you must tell Lit-
44 tleton to let you have as much money as you want, and I will pay him the same per cent. he is getting, as it is impossible for me to send you money now on any terms, although I have it; but you and Littleton booth know it is impossible for me to get exchange, and you or Littleton knows of the great difficulty for me to get letters to you or you to me. On 27 April I succeeded in getting a check on New York from a banker and friend of mine for $2,000, at 6 per cent. premium, and on that day I enclosed check to Mr. A. V. Riddle by Adams Express Co., for $2,000, and the next day I enclosed him a duplicate check for same amount by mail by way of Memphis, Tennessee; and that was to pay Mr. Brown $1,000 first May & $1,000 first June on the house, as I wished him to go on and finish it. I also wrote to Littleton & Mr. Brown the same day, by Adams Express Company, on 27th April, but I have not he'rd from one of them yet, so you see the difficulty in getting or sending letters. Write often, as you see the difficulty of my getting or sending your letters or you mine. My love for yourself & all the children.

Yours truly, as ever,

SILAS OMOHUNDSO.

Letter.

RICHMOND, VA., *July 2d*, 1861.

45 MY DEAR SON: This leaves me well and in fine health; my health has been improving ever since the we'ther settled, about 20 May. I have written several letters to you, Mr. Riddle, & Mr. Brown, since I heard from any of you, and knowing the cause I stopped writing, but unexpectedly to me I received your letter last evening of date 22d June, and I was truly glad to hear from you and to hear your mother, brother, and sisters ware all well. I also received two letters from Mr. W. H. Brown this morning, one of date 23, the other 26 June; all 3 letters came by Adams Express Company. I see you all have to mail your letters to me in Covington, and I have to direct my letters now to you & Mr. Brown to Covington, Ky., as I cannot direct them to Cincinnati. I am sorry to hear you will be discharged from your situation the first of July, but that is better than I expected, so you will have to do the best you can. I am glad to

hear Mr. Brown is progressing so well with the house; I hope he will soon get it done, so your mother can move into it and save house rent, but Mr. Brown writes me it is impossible for him to finish the house unless I can send him $1,000 more, and that I cannot do from the fact I cannot get exchange hear on New York or Philadelphia on *no* terms whatever; I would gladly do so if I could; I want you to see Mr. A. V. Riddle, and consult him and try to arrange your paper so as to
46 let Mr. Brown have one thousand dollars and I will make it all right with you and pay you the same interest you are getting. I wrote to Mr. F. G. Murphy at Lexington, Ky., who ow's me a little upwards of $1,400. I wrote about 10 or 12 of June, but have not received any answer; it is likely he never received my letter, or I his answer, if he wrote. I shall write to him again to-morrow, and if he can pay me that to you in Ky. money Mr. Brown says it will answer his purpose as well as a northern check or Ohio money, so if he can or does pay me that amount, and you can spair me one thousand dollars, it will overpay Mr. Brown's bill for the house, with what I have paid him; that is the best I can do unless I could get money from here to Cincinnatti; if I could I would not trouble you nor *no* one else about it, but would send check for the whole amount at once. Give my respects to Mr. Riddle & Mr. Brown, and accept the same for yourself, mother, and all the family. I hope you may receive this letter from your affectionate father.

SILAS OMOHUNDSO.

Letter.

RICHMOND, *July 20th*, 1861.

MY DEAR SON: This leaves me well and in as good health as usual. I received your last letter on the 12th July, dated 5 July, and I had re-
47 ceived yours & Mr. Brown's, and answered them a few days previous; I also received the two on 12th July from Mr. Riddle, sent to his care from Philadelphia; thay ware business letters, and I am vary much oblige' to Mr. Riddle and yourself for your attention in forwarding them; and the cause of my delay in answering your last letter is, I was expecting a letter every day from my friend Murphy of Lexington, Ky., who was owing me the money I wrote to you about, but I did not receive his letter until last evening, and he says it is impossible for him to pay me now, and that was the only hope I had to pay Mr. Brown, as I cannot send it to him from hear. I sincerely wish I could. I wrote to you in my last letter if you could, after consulting Mr. Riddle, pay Mr. Brown one thousand dollars, I would pay you the same interest you are getting for it and return it to you as soon as I possibly can bring or send it to you with safety. I am as anxious to pay Mr. Brown as he is to receive the money, as it is to my interest for him to finish the house as soon as possible, so as your mother and family can move into it, and save the rent she now has to pay. You and Mr. Brown & Mr. Riddle all know it is impossible for me to send money thare now; I wish I could. God knows what may turn up in the next 30 or 60 days. I hope
48 something good, so I can pay Mr. Brown & visit you all, as I want to see you all very much. Give my love to your mother, brother, & sisters, Julia and Hubbard, and say to your mother the cause of my not writing to her is she hears from me through you, and the great uncertainty of my letters or hers going through, & the high rate of postage

from here by express, 40c. on every letter; so my letters to you answers for all the family.

Your affectionate father,

SILAS OMOHUNDSO.

And rested his case.

The defendant then offered in evidence the depositions of the following witnesses, to wit: Adam N. Riddle, Warren H. Brown, John M. Edwards, Littleton I. Omohundro, and Sydney Omohundro.

49 UNITED STATES OF AMERICA,
District of Virginia:

The United States of America, to S. S. Carpenter, esq., United States commissioner for the southern district, Ohio, Cincinnati, Ohio, greeting:

We, reposing special confidence in your fidelity and provident circumspection, do hereby authorize and appoint you to take the testimony, in writing, of Adam N. Riddle, Warren K. Brown, and others, whom you are hereby authorized and required to bring before you at such time and place as you may designate and appoint for that purpose, and that at such time and place you will proceed to examine under oath, said witnesses annexed, at the instance of the defendant in a certain cause now pending and undetermined in our circuit court of the United States for the district of Virginia, before the judge thereof, wherein L. J. Omohundro is plaintiff, and Richard Cooper, executor of Silas Omohundro, dec'd, is defendant. The answers of the witnesses you will cause to be reduced to writing in the order in which they shall be answered, and shall then be signed by said witnesses. At the foot thereof you will add a certificate, subscribed by yourself, stating that it was sworn to and subscribed by said witnesses, and the time and place when and where the same was taken; which said examination of said witnesses so taken, with your certificate thereto attached, you will send directed to our clerk of our circuit court of the United States for the district of Virginia, sealed, with the names of the parties litigent endorsed thereupon, with early dispatch, together with this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond, Virginia, this 13th day of November, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independence the 94th.

[SEAL] W. H. BARRY, *Clerk.*

50 As counsel for the pl't'ff and def'd't, in the cause mentioned in the with' commission shall be taken on the 22d day of this month at the office of the Hon'bl' Henry Stanbury, in Masonic Hall, Cincinnati; that the taking may be continued from day to day, if necessary; and, if necessary, adjourned to some other place, with due notice to the parties or their counsel.

Richmond, Nov. 13, 1869.

WM W. CRUMP,
JAMES LYONS,
Counsel for the Def't.

It is hereby agreed between the plaintiff, counsel for the defendant, that the time for taking depositions under this dedimus be extended to the 6th day of December, 1869.

Cincinnati, O., Nov. 19, 1869.

L. J. OMOHUNDRO.
J. W. MOORE.

51 *Depositions of Adam N. Riddle, Warren H. Brown, John M. Edwards, Littleton J. Omohundro, & Sydney Omohundro.*

STATE OF OHIO, SOUTHERN DISTRICT,
City of Cincinnati, ss:

Depositions of witnesses, commencing on Monday the 6th day of December, in the year 1869, at the office of S. S. Carpenter, United States commissioner for the southern district of Ohio, at Cincinnati, Ohio, produced, sworn or affirmed, and examined by virtue of a commission issuing from the circuit court of the United States for the district of Virginia, to said S. S. Carpenter, United States commissioner directed, for the examination of Adam N. Riddle, Warren K. Brown, and others, in a certain cause depending in the said court, wherein L. J. Omohundro is plaintiff, and Richard Cooper, executor of Silas Omohundro, deceased, is defendant.

Present: L. J. Omohundro & J. H. Getzendanner, as counsel, F. W. Moore, esq., counsel for defendant.

ADAM N. RIDDLE, of the city of Cincinnati, Ohio, aged 63 years, or thereabouts, being produced, affirmed, and examined, on the part of the defendant, deposes as follows:

1st question by F. W. Moore, esq., for the defendant. State your name, age, residence, and occupation.

Answer. My name is Adam N. Riddle. I am sixty-three years old. I reside in the city of Cincinnati, (S. S. CARPENTER, *U. S. Comm'r, S. D. O.*) in the State of Ohio, in which city and State I have re-
52 sided since my birth. I am an attorney at law, and have been for over thirty years.

2d question by same. State whether you are acquainted with the parties to this suit; &, if so, when and where you became acquainted with them & under what circumstances.

Answer. I am acquainted with the plaintiff, L. J. Omohundro, and have been acquainted with him over twenty years. I have no acquaintance with Richard Cooper, executor, at all. I was acquainted with Silas Omohundro, deceased, in his lifetime. I became acquainted with Silas Omohundro some time in 1841, or 1842, at the time the purchase was made of the real estate on Smith street. He called on me professionally to examine the title of that property. I became acquainted with the plaintiff as the son of the said Silas. I made their acquaintance in this city.

3d qu. by same. State whether at any time, and, if so, when, Silas Omohundro remitted to you money to be applied to the benefit of Louisa Omohundro & her family.

Answ. I have no knowledge of any remittance for such purpose. He remitted to me in the year 1859 twenty-five hundred dollars to in-
53 vest for the plaintiff during his minority, and on his arrival at age to pay (S. S. CARPENTER, *U. S. Com'r S. D. O.*) the same over to him, (the plaintiff,) with the accumulations. About June, in the year, 1860, the securities in which the investment were made were transferred to Littleton J. Omohundro, the plaintiff, consisting of a bond for $1,000, and notes secured by mortgage amounting to $1,500, in all $2,500, with the accumulations thereon, pursuant to the directions of Silas Omahundro. In the year 1861, about June, I think, I received from Silas Omohundro a remittance of two thousand dollars for the purpose of paying upon the house that was then building by Mr. Warren H. Brown for Silas Omohundro, on the said Smith street property, where the family resided, and had resided, which I paid to Mr. Brown, and took his receipt therefore. This was in addition to $2,000 previously

paid to Mr. Brown on that house, making the sum of $4,000 paid to him through me on that account.

4th qu. by same. State, if you know, the names, ages, and occupations of the children of which you have testified in a former deposition that $1,200 a year for their support was not excessive.

Answer. Littleton J. Omohundro, the eldest, arrived at age, I think, in the year 1860. He was engaged in mercantile pursuit. Sidney Omohundro became of age in, I think, 1863. I am unable to say *had*
54 he was engaged. There was a daughter who married Mr. Robinson, and was living away from (S. S. CARPENTER, *S. D. O.*) home. I do not remember her name. There were two or three other younger children living at home, of whom Silas Omohundro spoke. I think there were four minor children at home in 1861.

5th qu. by same. State whether within your knowledge Louisa Omohundro and the children were at one time the slaves of Silas Omohundro.

(N. B.—This question is objected to by plaintiff's attorney as irrelevant.)

Answ. I have no knowledge of it. At the time I became acquainted with him he spoke of them as his children. The children were born here, all except two, and he always stopped with them when he came here.

6th qu. by same. State whether Louisa Omohundro was a person of white blood entirely.

(N. B.—This question objected to by plaintiff's attorney as irrelevant and incompetent.)

Answer. Her complexion was rather coppery; but I have understood from Silas Omohundro that 'he had no African blood in her, but rather West Indian. My own impression was that she was slightly mixed; but the explanation made by Silas removed the impression.

55 7th. qu. by same. Did Silas Omohundro state to you the (S. S. CARPENTER, *U. S. Com'r, S. D. O.*) condition of Louisia Omohundro before he brought her to Cincinnati, while he resided in Virginia?

(N. B.—Plaintiff's att'y objects to the question.)

Answer. He did not.

Cross-examination:

X-question by J. H. Getzendanner, for the plaintiff. Have you read over at this time your testimony previously given in this case? If yea, do you still believe your statements therein made to be correct?

Answer. Yes.

Question by F. W. Moore, for defendant. State w'ether, within your knowledge, Mrs. Louisa Omohundro is alive at this time.

Answer. She is not. She has been dead between two and three years.

ADAM N. RIDDLE.

Attest:

S. S. CARPENTER,
U. S. Comm'r, S. D. O.

Being unable to complete the examination of witnesses to-day, I adjourn the same until to-morrow, the 7th instant, at the same place.

56 S. S. CARPENTER,
U. S. Commissioner, S. Dist. O.

S. S. CARPENTER,
U. S. Comm'r, S. D. O.

STATE OF OHIO, *City of Cincinnati, ss.:*

Pursuant to adjournment of yesterday, *now* me, on this 7th day of December, 1869, at my office, in said city and State, the said parties hereinabove named, by their said counsel, and then and there came Warren H. Brown as a witness on behalf of the defendant above named, and the said Brown, a resident of the city of Cincinnati, in the State of Ohio, aged sixty-three years or thereabouts, being produced, sworn, and examined on the part of the defendant, deposes as follows:

Present: Getzendanner, for pl'ff; Moore, for defendant.

1st question by attorney for defendant. State your name, age, residence, and occupation.

Answer. My name is Warren H. Brown. I am sixty-three
57 years old. I reside in the city of Cincinnati, Ohio, and have resided there about forty-two years. I am a carpenter and builder.

2d qu. by same. State whether you are acquainted with the parties to this suit; and, if so, when did you first become ac- (S. S. CARPENTER, *U. S. Comm'r, S. D. O.)* quainted with them?

Answer. Yes. I am acquainted with said parties. I first became acquainted with Silas Omohundro, now deceased, in the year of 1840 or 1841 at Cincinnati, Ohio. The plaintiff, L. J. Omohundro, was then a child. I saw him and his mother and an older sister when they came here and moved into the house I sold them—an old frame house between Fourth and Fifth street. I never saw Mr. Cooper, the defendant, but two or three times. The last time I saw him he was out here with Mr. Silas Omohundro before the war.

2nd. qu. by same. State what was the price to be paid for the house built by you on the contract by Silas Omohundro; and from whom did you receive pay for the same? Give the dates and amounts of each payment.

Answer. The price to be paid on said contract was forty-two hundred dollars. I received four thousand dollars through Mr. Riddle. There
58 was an addition to the contract for additional work on the house to the amount of four hundred-odd dollars. That, with also the two hundred dollars, was paid to me by Littleton J. Omohundro. I cannot here give the dates. I suppose I could by looking over my old accounts, which it would take some time to do. This additional work was ordered by Silas Omohundro, (S. S. CARPENTER, *U. S. Comm'r S. D. O.*)

4th qu. by same. State whether you give the names, ages, and occupations of the children of Mrs. Louisa Omohundro, which you have in a former deposition testified; and, if so, state them.

Answ. I can give the names of the two boys, Littleton Omohundro & Sidney Omohundro. Their ages I could not give. The name of one of the girls was Cinderella; the name of the other I do not remember. I do not know any of their ages. If I have ever known I do not recollect now. There were four girls and two boys. One of the girls, Cinderella, is dead. I do not recollect when she died.

5th qu. by same. Are these the children you referred to when you testified in a former deposition that $1,200 a year for their support was not unreasonable?

Answ. Yes; with the exception of the oldest daughter, who was married and out of the family.

59 6th qu. by same. State what you know, if anything, about Mrs. Louisa Omohundro & her children, brought to Cincinnati with

her, as to their previous condition and relationship towards Silas Omohundro.

Answ. I do not know what their previous condition was. Silas Omohundro brought them here and acknowledged the children as his own. As to Louisa, all their actions and intercourse that I ever saw was (S. S. CARPENTER, *U. S. Com'r, S. D. O.*) just the same as man and wife.

7th qu. by same. Did Silas Omohundro, at any time, admit to you that Louisa Omohundro was his former slave?

(N. B.—Counsel for plaintiff object to this question as irrelevant.)

Answer. I never had any conversation with him on the subject. He never told me what had been their relations before.

8th qu. by same. State whether, within your knowledge or from your observation, Louisa Omohundro was a white or a colored person.

(N. B.—Counsel for plaintiff objects to this question as irrelevant.)

Answ. Her complexion was not so white, but her hair was as black and straight as that of an American person. Her complexion
60 was more like that of an Indian. I have understood that her parents were from the West Indies.

Cross-examination:

1st X-question by pl't'ff's attorney. Do you now remember the number of children born to Silas Omohundro by Louisa after they (S. S. CARPENTER, *U. S. Comm'r S. D. O.*) came here, and what number were living at home in the years 1861, 1862, and 1863?

Answ. I remember that there were four children born to him by her after they came here. I think there were four living at home in the years 1861, 1862, and 1863, together with the plaintiff in this case; Cinderella being one of those living at home.

X 2d qu. by same. State who paid the taxes in the years 1861, 1862, & 1863, on the Smith street property.

(N. B.—Qu. objected to by def't's att'y.)

Answ. I know that one of the boys, I don't know which, did pay those taxes. I furnished the money and Littleton gave me his note, which he paid.

W. H. BROWN.

Attest:

S. S. CARPENTER,
U. S. Comm'r, S. D. O.

STATE OF OHIO,
County of Hamilton, City of Cincinnati, ss:

61 I, Samuel S. Carpenter, United States commissioner in and for the southern district of Ohio, named in the annexed commission, do certify that Adam N. Riddle was affirmed and Warren H. Brown sworn by me, before they gave their foregoing depositions, to testify the truth, the whole truth, and nothing but the truth, in the cause named in the caption and in said commission; that their above-written depositions were taken and reduced to writing by me in their presence, (S. S. CARPENTER, *U. S. Comm'r S. D. O.*) and by me read to them, and by them subscribed in my presence; that said depositions were taken at the times and place above set forth, instead of the time and place endorsed on the

deposition, by the consent of the plaintiff and his attorney then and there appearing and consenting.

Witness my hand and seal this 7th day of December, A. D. 1869.

SAM'L S. CARPENTER. [SEAL.]
United States Commissioner in and for the Southern District of Ohio.

Comm'r's fees, services, stamp, &c., $12.50. Paid by def't. S. S. C.

[Int. rev. stamp, 5 cents, canceled.]

62 THE STATE OF OHIO, *Hamilton County:*

The circuit court of the United States, district of Virginia.

LITTLETON J. OMOHUNDRO, PLAINTIFF,
vs.
RIC'D COOPER, EX'R OF SILAS OMOHUNDRO, dec'd.

The plaintiff will take notice that, on Saturday, the 15th day of January, A. D. 1870, the defendant above named will take the depositions of Littleton J. Omohundro, Sidney Omohundro, and sundry witnesses, to be used as evidence on the trial of the above cause, at the office of Sam'l S. Carpenter, esq., U. S. com'r, No. 21 West Third st., in the city of Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

F. W. MOORE,
Attorney for Defendant.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said depositions may be taken is, by agreement, waived; also all exceptions in regard to time.

L. J. OMOHUNDRO.

63 STATE OF OHIO,
County of Hamilton, City of Cincinnati, ss:

To John M. Edwards, (217, W. 4th,) Dr. Jos. L. Thornton, (principal Hughes High School.)

You are hereby commanded to be and appear before me, Sam'l S. Carpenter, a United States commissioner in and for the southern district of Ohio, duly appointed, commissioned, and sworn, at my office, No. 21 West Third street, in the city of Cincinnati, county and State aforesaid, on Saturday, the fifteenth day of January, A. D. 1870, at 2 o'clock p. m., then and there to be examined, and the truth to speak, on behalf of the defendant in a certain action pending in the circuit court of the United States, district of Virginia, wherein L. J. Omohundro is plaintiff and Richard Cooper, ex'r of Silas Omohundro, dec'd, is defendant.

Hereof fail not, under the penalty of the law.

Witness my hand and official seal this 14th day of January, A. D. 1870.

[SEAL.] S. S. CARPENTER,
United States Commissioner, Southern District of Ohio.

64 JANUARY 15, 1870.

Served a true copy of this writ on John M. Edwards, at residence; Jos. L. Thorton not found.

C. MOORE, *Const.*

Court fees, $1.25, paid.

C. MOORE, *Const.*

Depositions of Sydney Omohundro, Warren H. Brown, &c.

STATE OF OHIO,
County of Hamilton, City of Cincinnati, ss:

To Sidney Omohundro, (89 East 2d street,) & Warren H. Brown, (Cent'l av'ue, below 2d, exchange office:)

You are hereby commanded to be and appear before me, Sam'l S. Carpenter, a United States commissioner in and for the southern district of Ohio, duly appointed, commissioned, and sworn, at my office, No. 21 West 2nd street, in the city of Cincinnati, county and State aforesaid, on Saturday, the fifteenth day of January, A. D. 1870, at 2 o'clock p. m., then and there to be examined, and the truth to speak, on behalf of the defendant in a certain action pending in the circuit court of the United States, district of Virginia, where Littleton
65 J. Omohundro is plaintiff and Rich'd Cooper, ex'r of Silas Omohundro, is defendant.

Hereof fail not, under the penalty of the law.

Witness my hand and official seal, 2 o'clock p. m. this fourteenth day of January, A. D., punctually, 1870.

S. S. CARPENTER, [SEAL.]
U. S. Commissioner, Southern District of Ohio.

Received and served by copy personally on each January 14th, 1870.

G. W. CARE, *Const.*

Servis, $1.40.

Depositions of witnesses taken before me, Samuel S. Carpenter, United States commissioner in and for the sixth circuit and southern district of Ohio, duly appointed and authorized to take depositions, &c., commencing on Saturday, the fifteenth day of January, in the year eighteen hundred and seventy, (1870,) at the office of the said Samuel S. Carpenter, United States commissioner, No. 21 West Third street, in the city of Cincinnati, in the county of Hamilton & State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, to be used as evidence on behalf of the defendant in a cer-
66 cause pending in the circuit court of the United States for the district of Virginia, wherein Littleton J. Omohundro is plaintiff and Richard Cooper, executor of Silas Omohundro, deceased, is defendant, the said defendant being present by F. W. Moore, as his attorney, and the said plaintiff being present in person and also by Jacob H. Getzendanner, as his attorney. Taken in pursuance of the annexed notice, service thereof having been accepted by said plaintiff.

And there *and there* WARREN H. BROWN, a witness, aged sixty-three years, or thereabouts, being produced and carefully examined and cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, in said cause, deposes as follows:

1st question by F. W. Moore, esq., att'y for defendant. State your name, age, and residence; and how far is such residence from Richmond, Virginia?

Answer. My name is Warren H. Brown. I am sixty-three years old. I reside in the city of Cincinnati, in the State of Ohio, upwards of five hundred miles from the city of Richmond, Virginia.

67 2d ques. by same. State whether or not you have any knowledge of a house and lot of ground, situated on the west side of Smith street, between 4th and 5th streets, in Cincinnati, Ohio, formerly owned by the late Silas Omohundro.

(MEMO.—Question objected to by pl'ff's counsel, J. H. Getzendanner, as irrelevant.)

Answer. Yes, sir; I know that house. I built it for Silas Omohundro. I have knowledge of the house and ground ever since the year 1836. I bought the premises, in 1836, for myself. I sold the premises to Mr. Silas Omohundro in 1841 or 1842, I think.

(MEMO.—The answer is objected to by pl'ff's counsel on the ground of irrelevancy & because of its incompetency, for the reason that the highest and best evidence is the deeds conveying the property to the parties mentioned by the witness.)

3d ques. by same. State what, in your opinion, is the value, at the present time, of the house and lot of ground of which you have just spoken.

(MEMOR.—Objected to by pl'ff's counsel on the ground of irrelevancy, & also because of incompetency, for the reason that no proper foundation has been laid for the expression of that kind of an opinion.)

Answer. My opinion would be based upon my own judgement.

68 I do not know that I know the value of property there correctly. I should put it between ten and twelve thousand dollars.

(MEMOR.—Answer objected to for the same reasons that were given for objection to question.)

Cross-examined by plaintiff's counsel:

X 1 question. Do you, of your own knowledge, know that the title of the lot spoken of by you, on the west side of Smith street, was ever in the name of Silas Omohundro, deceased?

(MEMO.—Objected to as incompetent by def't's att'y.)

Answer.—I do not.

X 2 question by same. Is not the estimate you have just made of the value of the house and lot on Smith street merely guess-work, and made without inquiry or knowledge of its value?

Answer. My estimate is based upon my general knowledge of the value of property in the city. It is not merely guess-work, but based upon my general knowledge of values. I have made no inquiry of anybody.

X 3 question by same. Have you been engaged in the purchase and sale of real estate in the city as a business?

Answ. No; I never was at any time.

W. H. BROWN.

69 And at the same time and place, JOHN M. EDWARDS, a witness aged fifty-five years, or thereabouts, being produced and carefully examined, and cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, in the cause named in the caption, deposes as follows:

1st question by F. W. Moore, esq., for defendant. State your name, age, residence, & occupation, and how far you reside from Richmond, Virginia.

Answer. My name is John M. Edwards. My age is fifty-five years.

I reside in the city of Cincinnati, Ohio, more than five hundred miles from Richmond, Virginia. I am a teacher in the Hughes High School.

2d quest. by same. State whether you were acquainted, in her lifetime, with Mrs. Louisa Omohundro; and, if so, had she the general reputation of being a white or a colored person?

(MEMOR.—Question objected to by plaintiff's attorney as irrelevant as to first part, and, as to the latter part, on the ground of incompetency, because no legal foundation has been laid for it.)

Answer. I was acquainted with her to this extent: I was introduced to her once, when visiting her sick son. That was the extent of my acquaintance with her. I do not know whether she had the gen-
70 eral reputation of being a colored woman. I have heard such a statement.

(MEMO.—Att'y for plaintiff objects to answer as irrelevant and incompetent.)

3d ques. by same. Was the question as to whether she was a white or colored person ever agitated within your knowledge; and, if so, under what circumstances?

(MEMOR.—The first part of the question objected to as irrelevant, and the latter part as utterly incompetent.)

Answer. After her son had been a year and a half in *an* school, and six months of the time in my room, I was by some person informed that his mother was a colored woman. I do not remember by whom. The question never came up in any way affecting his standing in the school.

(MEMO —Answer objected to by pl't'ff's counsel as irrelevant.)

JOHN M. EDWARDS.

And, at the same time and place, the plaintiff, Littleton J. Omohundro, aged 31 years or thereabouts, being produced, and carefully examined and cautioned and duly sworn to testify the truth, the whole truth, and nothing but the truth, in the cause named in the caption, deposes as follows, to wit:

71 1st question by F. W. Moore, esq., for the defendant. State your name, age, residence, and occupation, and how far you reside from Richmond, Virginia.

Answer. My name is Littleton J. Omohundro. I am thirty-one years old. I reside in the city of Cincinnati, Ohio, upwards of five hundred miles from Richmond, Va. I am a book-keeper.

2d ques. by same. State whether or not you have at any time been known by the name of Littleton J. Tandy; whether you have ever used the same; and, if so, when and under what circumstances, and more particularly after the transfer of real estate from your father to yourself.

(MEMOR.—Question objected to as irrelevant.)

Answer. I have always been known as Littleton J. Omohundro, but was mentioned in the deed from Warren H. Brown as Littleton J. Tandy, Tandy being my mother's maiden name. I mean the deed from said Brown to my mother, as Louisa Tandy and others, in which I was mentioned as Littleton J. Tandy. I have never used the name of Tandy myself except in conveying the property from the name of Tandy to the name of Omohundro. The object of the conveyance was to have the property in our own proper name.

72 2d ques. by same. Do you wish to be understood as saying, after having your memory refreshed, that the name of Tandy was applied to you in conveying to you an interest of that property?

(MEMO.—Qu. objected to by pl'ff's counsel.)

Answ. Yes, sir.

(MEMO.—Answer objected to by pl't'ff's att'y.)

4th qu. by same. State whether or not your mother, Louisa Omohundro, at any time was known by the name of Louisa Tandy, and under what circumstances.

(MEMO.—Ques. objected to as irrelevant by pl't'ff's att'y.)

Answ. That was her maiden name.

(MEMO.—Ques. objected to by pl'ff's attorney as irrelevant.)

5th ques. by same. State whether or not your mother was a white or colored person.

(MEMO.—Question objected to by pl'ffs attorney as irrelevant.)

Answer. She was a white person.

Cross-examination by pl't'ff's counsel:

X 1st question. In your examination-in-chief you have spoken of Louisa Omohundro as your mother; now state the name of your father, to whom you have referred in your examination.

Answ. Silas Omohundro.

Re-examination by def'd't's *name:*

73 1st question 1*st question*. State whether or not, to your knowledge, you' brothers and sisters were mentioned in the conveyance heretofore referred to, by the name of Tandy.

(MEMO.—Pl'ff's counsel objects to the first part of the question as irrelevant, & the latter part as incompetent, the deed itself being the highest and best evidence of what it contains.)

Answer. They were mentioned in the deed by the name of Tandy, but never used the name except in correcting the paper.

(MEMO.—Counsel for plaintiff makes the same objections to the answer as to the question.)

L. J. OMOHUNDRO.

The further examination of witnesses for the defendant was postponed until Monday, the 17th of January, at the same time and between the same hours.

S. S. CARPENTER,
U. S. Comm'r, S. D. O.

MONDAY, *January 17th*, 1870.

Pursuant to adjournment now come the defendant's counsel and the plaintiff's counsel, at the place aforesaid, and then and there was produced SIDNEY OMOHUNDRO, a witness, aged twenty-seven years or thereabouts, and the said witness, being carefully examined and
74 cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, in the cause named in the caption, deposes as follows, to wit:

1st question by F. W. Moore, esq., for defendant. State your name, age, residence, and occupation, and how far you reside from Richmond, Virginia.

Answer. My name is Sidney Omohundro. I am twenty-seven years old. I reside in Cincinnati, Ohio, upwards of five hundred miles from Richmond, Virginia. I am a book-keeper.

2d question by same. Were you at any time, and when, known by the name of Sidney Tandy, and under what circumstances?

Answer. I was at one time, only, known by that name, and under circumstances as follows, viz: In a matter of transfer of some property on

Smith street to my mother and others, including myself; at that time the name of Tandy was used by the person making the deed to my mother, and afterwards I used the name of Tandy to make the record correct, by bringing it into my proper name of Omohundro.

(MEMO.—Before the answer was written the question was objected to by plaintiff's counsel as irrelevant, and also as to the circumstance incompetent, the record being the best evidence and he also objects to the answer for the same reasons.)

75

3rd question by same. What was the name of your mother; also, what name was used in referring to her in connection with the transfer of property on Smith street, in this city, and before referred to by you?

Answer. My mother's name was Louisa Omohundro.

(MEMO.—Plaintiff's attorney objects to the question as irrelevant—the first part; and as to the second part, as incompetent, because the record itself is the highest and best evidence.)

Her maiden name of Tandy was used in connection with said transfer.

(MEMO.—Answer objected to for the same reasons stated in objection to question, viz, irrelevancy and incompetency.)

4th ques. by same. What, in your opinion, is the value of the house and lot of ground in part owned by you—the same conveyed to you as before mentioned?

(MEMO.—Question objected to as irrelevant and incompetent—irrelevant as not having any application to the matters in controversy in this suit, & incompetent because no proper foundation has been laid for the question as to the value of the property.)

76

Answer. I presume its present value is in the neighborhood of ten thousand dollars.

(MEMO.—Answer objected to by plaintiff's attorney for the same reasons stated in objection to question.)

5th ques. by same. Are you acquainted with the present value of real estate in the vicinity of this lot?

Answer. I am not. I will state on what grounds my previous answer was based: They were based upon conversations I had some time ago with a real-estate agent. I have never myself dealt in real estate, neither have I purchased or sold any.

(MEMO.—Question and answer both objected to as irrelevant and incompetent, for the reasons previously given in objection to 4th question.)

6th ques. by same. Was your mother, Mrs. Louisia Omohundro, a person of white blood?

(MEMO.—Question objected to as irrelevant, have nothing to do with the issue between the parties to the suit.)

Answer. My mother was known and recognized in this city as a white woman.

(MEMO.—Answer objected to as irrelevant.)

All of her associations were white, and the circles in which she moved and with which she was in any manner whatever connected were white, & I know of nothing to cause me to believe otherwise than that she was white.

77

(MEMO.—Objected to as irrelevant.)

7th ques. by same. Are you firmly of the belief that your mother was a person of pure white blood?

(MEMO.—Objected to by the plaintiff's counsel as irrelevant, for the reasons above given.)

Answer. I do so believe.
(Answer objected to for same reasons.)

SIDNEY OMOHUNDRO.

THE STATE & SOUTHERN DISTRICT OF OHIO,
City of Cincinnati, ss :

I, Samuel S. Carpenter, a United States commissioner, duly appointed and authorized under the laws of the United States to take depositions to be used in the courts thereof, and acting as such in the sixth circuit and southern district of Ohio, do certify that the reason for taking the foregoing depositions was, and the fact was, that all the above-named witnesses, Warren H. Brown, John M. Edwards, Littleton J. Omohundro, resided in the city of Cincinnati, in the county of Hamilton, and State of Ohio, more than one hundred miles from the city of Richmond, in the State of Virginia, where the cause named in the caption is appointed by law to be tried; that notice of the time
78 and place of taking said depositions were served upon the plaintiff, who attended the same in person and by attorney, as above set forth; that the said witnesses were by me duly sworn to testify the truth, the whole truth, and nothing but the truth in the said cause; and that their foregoing depositions were reduced to writing by me, in the presence of said witnesses, and by me read to them, and by them, respectively, subscribed in my presence. I further certify that I am not of counsel or attorney to either of the parties to said suit, or in any wise interested in the event thereof; and, further, that I have retained the said depositions in my possession for the purpose of transmitting the same by mail to the court for which the same were taken.

Witness my hand and seal this 15th day of January, A. D. 1870, at Cincinnati, O.

SAM'L S. CARPENTER, [SEAL.]
U. S. Commissioner, Southern District of Ohio.

[5-ct. int.-rev. stamp, canceled.]

Commissioner's fees & costs of subpœnas, stamps, &c., $12.50. Paid by defendant.

S. S. C.

And also offered a witness, RICHARD COOPER, who is the de-
79 fendant in this cause, and who testified that he was engaged in business with Silas Omohundro for ten or fifteen years before the war, in the purchase and sale of slaves; that the said Omohundro was never married, and resided always in Richmond, where he died; that Louisa Tandy, otherwise called Louisa Omohundro, was the reputed slave of Silas Omohundro, who said that she was so; that she was not the mother of the plaintiff, but the sister of his mother, who was also the reputed slave of Silas Omohundro, and died in Virginia. That the said women were born colored persons, and Silas Omohundro told the witness in Cincinnati, in the year 1860, that one of the children of the said Louisa, then present, (witness thinks it was the youngest one,) was not his child. That Silas Omohundro had lived for many years before his death, and since he carried Louisa to Ohio, with another slave of his, named Corrinna, who had borne him several children, and who were the chief beneficiaries in his will; and that the said Corinna is the same person mentioned in the will.

The defendant also offered in evidence a deed in the words and figures following, to wit :

Deed.—Received and recorded 10th May, 1847.

Know all men by these presents that Silas Omohundro, of Richmond, Virginia, in consideration of one dollar to him paid by Louisa
80 Tandy, Julia Ann H. Tandy, Littleton J. Tandy, Martha Euphana Tandy, Sidney Tandy, and Cindrella Tandy, of Hamilton County, of Ohio, the receipt whereof is hereby acknowledged, doth hereby bargain, sell, and convey to the said Louisa Tandy, for her natural life, and remainder in fee to Julia Ann H. Tandy, Littleton J. Ackers Tandy, Martha Euphama Tandy, Sidney Tandy, and Cindrella Tandy, children of Louisa Tandy, their heirs and assigns forever, the following real estate, viz: All that certain frame house and lot in Cincinnati on the west side of Smith street, between Fourth and Fifth streets and being twenty-five feet in front on Smith street, and extending back the same width, at right angles from Smith street, eighty-five feet, more or less, to an alley, and lies next north of Warfield's house and lot and now owned by W. M. Corry, esq'r, attorney-at-law, being same property conveyed by N. Longworth and wife in part to said Omohundro by deed dated April 18th, 1840, and recorded in book 75, page 75, and Warren H. Brown and wife to said Omohundro, by deed dated April 18th, 1840, and recorded in book No. 75, page 76, and balance by S. S. Smith and wife to said Omohundro by deed dated October 21st, 1841, and recorded in book No. 81, page 318, the intention of this deed being to convey said property, in fee, to said Julia Ann H. Tandy, Littleton J.
81 Tandy, Martha Euphama Tandy, Sidney Tandy, and Cindrella Tandy, subject to the life estate of Louisa Tandy in said premises which is hereby intended to be granted, together with all the privileges and appurtenances to the same belonging, to have and to hold the same to the said Louisa Tandy, for her natural life, and remainder to Julia Ann N. Tandy, Littleton J. Tandy, Martha Euphama Tandy, Sidney Tandy, and Cindrella Tandy, their heirs and assigns forever. In witness whereof the said Silas Omohundro has hereunto set his hand and seal this tenth day of May, in the year eighteen hundred and forty-seven.

(Signed) SILAS OMOHUNDRO. [SEAL.]

Signed, sealed, acknowledged, and delivered in the presence of—
J. H. CLEMMER.
A. N. RIDDLE.

Notary's certificate.

STATE OF OHIO, *Hamilton County, ss:*

Be it remembered that on this tenth day of May, in the year of our Lord one thousand eight hundred and forty-seven, before me, the subscriber, a notary public in and for said county, personally came Silas Omohundro, the grantor in the above conveyance, and acknowledged the signing and sealing thereof to be his voluntary act and deed for the uses and purposes therein mentioned. In testimony whereof I
82 have hereunto subscribed my name and affixed my seal on the day and year last aforesaid.

[N. P. SEAL.] J. H. CLEMMER,
Notary Public.

Recorder's certificate.

STATE OF OHIO, *Hamilton Co., ss:*

I, Thomas L. Young, recorder of the county aforesaid, do hereby certify that the above and foregoing is a true copy of a deed—Silas Omo-

hundro to Louisa Tandy et als.—as received and recorded May 10th, 1847, and recorded in deed No. 120, page 343, of Hamilton Co. records.

Witness my name and seal this 1st day of February, A. D. 1870.

[SEAL.] THO'S L. YOUNG,
Recorder, Ham. Co., Ohio.

[5-c't int. rev. stamp, canceled.]

Judge's certificate.

THE STATE OF OHIO, *Hamilton County, ss:*

I, Charles C. Murdock, presiding judge of the court of common pleas for the first district within and for the State of Ohio, the same being a court of law and record, in and for the county of Hamilton, do hereby certify that Thomas L. Young is recorder of deeds, &c.,
83 of said county of Hamilton, and was such recorder at the time of making and subscribing the foregoing certificate, and that the attestation of the said recorder is in due form of law, and by the proper officer.

In testimony whereof I do hereto subscribe my name, at Cincinnati the first day of February, A. D. 186 .

[SEAL.] CHA'S C. MURDOCK,
Presiding Judge Court Com. Pleas, Ham. Co., Ohio.

[5-c't int. rev. stamp, canceled.]

Clerk's certificate.

THE STATE OF OHIO, *Hamilton County, ss:*

I, F. Bishop Disney, clerk of the court of common pleas, within and for said county of Hamilton, do hereby certify that Charles C. Murdock, whose name is subscribed to the foregoing certificate, was at the time of subscribing the same presiding judge of the court of common pleas for the first district within and for the State of Ohio, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

[5-ct. int. rev. stamp, canceled.]

In testimony whereof, I, the clerk aforesaid, have hereunto set my hand, and affixed the seal of the said court, at Cincinnati, in
84 the said county, this 1st day of February, A. D. 1870.

[SEAL.] F. BISHOP DISNEY,
Clerk Court of Common Pleas, Hamilton County, Ohio.

And a copy of the will of Silas Omohundro in the words and figures following, to wit:

Will.

I, Silas Omohundro, of the city of Richmond, and State of Virginia, being of sound mind and disposing memory, do make and publish this as and for my last will and testament, and do hereby revoke and declare null and void all wills by me heretofore made.

In the first place, I do absolutely emancipate, and forever set free from all manner of servitude, my woman Corinna Omohundro, and her five children, Alice Morton Omohundro, Colan Omohundro, Riley Crosby Omohundro, William Rainey Omohundro, and George Nelson Omo-

hundro, and who are also my children. I give and devise to the said Corinna Omohundro, for and during her natural life and for her sole use and benefit, my entire lot on Seventieth street in the city of Richmond, Virginia, with all the buildings thereon, and other improvements, including the jail. This lot I give the said Corinna as a place of
85 residence, but if after my death she should prefer to live and reside in the city of Philadelphia, then in lieu and stead of said lot on Seventeenth (17) street, I give her for her life two adjoining lots and tenements on Poplar street, making one, in Philadelphia, State of Pnensylvania, between 15th (Fifteenth) and Sixteenth streets, one of which I bought of Nathan Stritch and the other of Eli Hat, whichever of these lots she may select as her residence, whether the lot in Richmond or the two adjoining tenements in Philadelphia. I design it for her sole *in*clusive use and benefit, so that, if she would marry, this devise shall in no wise be for the use or benefit of her husband, or the property be in any wise subject to his debts, contracts, or control. I give to the said Corinna all my household and kitchen furniture of every kind, including silver-plate and glass. I also give her all her wearing apparel of every kind, and the gold watch, chain, and other appendages thereto, which she now has in her possession; also I give to her the two diamond finger-rings and diamond cross she now *use* and all other pieces of jewelry she now has or may have in her possession at the time of her death.

At the death of the said Corinna Omohundro, I authorize and direct my executor, hereinafter appointed, to sell such of the losts before
86 mentioned and devise' to her for life as she may select as her residence, upon such terms as she may think proper, and divide equally the proceeds of said sale between her said children, Allice Morton Omohundro, Colan Omohundro, Riley Crosby Omohundro, William Rainey Omohundro, George Nelson Omohundro, and any other child she may have at the time of my death.

I give to the said Colan Omohundro (my son) my gold watch and chain, and appendages attached thereto.

I emancipate, and set free from all servitude whatever, my woman Agness and her two children, Virginia and Waverly. I authorize, empower, and direct my executor to sell upon such terms as he may deem proper, the rest and residue of my whole estate, both real and personal, and collect whatever money may be due and to divide equally the proceeds of said sale, and the money so collected, and whatever money I may have on hand, betwe'n the said Corinna Omohundro, Allice Morton Omohundro, Colan Omohundro, Riley Crosby Omohundro, William Rainey Omohundro, and George Nelson Omohundro, and so to invest the several portions of the said Allice Morton Omohundro, Colan Omohundro, Riley Crosby Omohundro, William Rainey Omohundro, and George Nelson Omohundro, as that it shall carry interest until he or she
87 shall severally attain the age of twenty-one years, when the principal shall all be severally paid to such one of them. And as Corinna Omohundro has always been a kind, faithful, and dutiful woman to me, and an affectionate mother, and will continue to be so and bring up her children in a proper manner, I direct my executor to pay over to her, semi-annually, the interest arising from the investments he may make of the legacies given to her said children; that she shall apply the same to her and their support, maintenance, and education, paying, however, as before directed, the principal to each child as he or she attains the age of twenty-one years, and when, of course, the interest of that portion ceases to be paid to Corinna. My executor will

find I have real estate in Lancaster, Pennsylvania, as well as that in Philadelphia, but the property in Philadelphia is not to be sold untill after the death of Corinna, if she determines to live in that city.

Should either of my said children, Allice M. Omohundro, Colan Omohundro, Riley Crosby Omohundro, William Rainey Omohundro, or George Nelson Omohundro, die before he or she attains the age of twenty-one years, without a child living at his or her death, that all the property, money, and estate hereby given and bequeathed to such child, I give and bequeath in equal portions to the survivors of the said children.

88 In conclusion, I declare my sole purpose in making this, my last will, is to give my whole estate, of whatever it may consist, (except Agness and her children,) to Corinna and her children in the manner specified in it. And as my good friend Richard Cooper, of Warrenton, Fauquier, Virginia, knows this, I appoint him my sole executor and beg that he will qualify as such.

In witness whereof I have hereunto set my hand and affix' my seal this 16 (16) day March, 1864, at the city of Richmond.

SILAS OMOHUNDRO. [L. S.]

Signed, sealed, acknowledged, declared, and published by Silas Omohundro, as and for his last will and testament, in our joint presence, each of us in the presence of the said Silas Omohundro and of each other, and at his request attesting this as his will, this 16th day of March, 1864.

JOSEPH MAYO,
THO'S M. JONES.

Clerk's certificate.

VIRGINIA:

89 At a circuit court of the city of Richmond, continued and held at the State court-house, in the said city, on the fourth day of July, 1864.

This writing, purporting to be the last will and testament of Silas Omohundro, deceased, was this day produced in court by Richard Cooper, the executor therein named, for probat'; and, on the motion of the said Richard Cooper, by counsel, it was ordered that Joseph Mayo and Thomas M. Jones, the subscribing witnesses to the said writing, should be summoned to appear here on the 8th day of the present month, at eleven o'clock a. m., to prove the said will.

And at another day, to wit, at a circuit court of the city of Richmond, continued and held at the State court-house, in the said city, on the 8th day of July, 1864, this writing was proved by the oaths of Joseph Mayo and Thomas M. Jones, the subscribing witnesses thereto, and was ordered to be recorded. And thereupon, on the motion of the said Richard Cooper, who took the oath of an executor, and, together with J. S. Eggborn and Corinna Omohundro, his securities, who justified on oath as to their sufficiency, entered into and acknowledged a bond in the penalty of one hundred thousand dollars, payable and conditioned as the law directs, a certificate was granted him for obtaining a probat' of the said will in due form.

Teste:

BENJA. POLLARD, *Clerk.*

90 A copy. Teste:

BENJ. H. BERRY,
Clerk Chancery Court of Richmond.

And then offered in evidence the ordinance of the convention of Virginia, passed on the 17th day of April, in the year 1861:

Ordinance.

Preamble.

No. 1.—An ordinance to repeal the ratification of the Constitution of the United States of America by the State of Virginia, and to resume all the rights and powers granted under said Constitution.

The people of Virginia, in their ratification of the Constitution of the United States of America, adopted by them in convention on the twenty-fifth day of June, in the year of our Lord one thousand seven hundred and eighty-eight, having declared that the powers granted under the said Constitution were derived from the people of the United States, and might be resumed whensoever the same should be perverted to their injury and oppression; and the Federal Government, having perverted said powers, not only to the injury of Virginia, but the oppression of the southern slave-holding States:

Repeal of ordinance of 17th June, 1788, and of subsequent acts of assembly.

Now, therefore, we, the people of Virginia, do declair
91 *and ordain*, That the ordinance adopted by the people of this State in convention on the 25th (twenty-fifth) day of June, in the year of our Lord one thousand seven hundred and eighty-eight, whereby the Constitution of the United States of America was ratified, and all acts of the general assembly of this State ratifying or adopting amendments to said Constitution are hereby repealed and abrogated; that the union between the State of Virginia and the other States under the Constitution aforesaid is hereby dissolved, and the State of Virginia is in the full possession and exercise of all the rights of sovereignty which belong and appertain to a free and independent State.

Union between Virginia and other States dissolved.

Constitution of United States not binding

And they do further declare, That said Constitution of the United States of America is no longer binding on any of the citizens of this State.

When ordinance shall take effect.

This ordinance shall take effect and be an act of this day when ratified by a majority of the votes of the people of this State, cast at a poll to be taken thereon on the fourth Thursday in May next, in pursuance of a schedule hereafter to be enacted.

Done in convention, in the city of Richmond, on the seventeenth day of April, in the year of our Lord one thousand eight hundred and sixty-one, and in the eighty-fifth
92 year of the Commonwealth of Virginia and the ordinances of the said convention.

No. 9.—An ordinance to call the volunteers into the service of the State and for other purposes, passed April 17, 1861.

Governor authorized to call into volunteers service.

Be it ordained, That the governor of the Commonwealth be, and he is hereby authorized and required, to call into the service of the State as many volunteers as may be necessary to repel invasion and protect the citizens of the

State in the present emergency; which volunteers he will receive in companies, and organize into regiments, brigades, and divisions, according to the force required; and the governor shall appoint and commission the general, field, and staff officers of said volunteers, and proceed to have them organized and instructed; and that he shall immediately invite all efficient and worthy Virginians and residents of Virginia in the Army and Navy of the United States to retire therefrom, and to enter the service of Virginia, assigning to them such rank as will not reverse the relative rank held by them in the United States service, and will at least be equivalent thereto.

Governor to appoint and commission the officers.

Governor to invite Virginians in the Army and Navy of the United States to enter the service of Virginia.

2. *Be it further ordained*, That the governor shall repel invasion, and see that in all things the Commonwealth take no detriment, and shall exercise for this purpose the powers conferred upon him by the constitution and laws of the State.

Governor to repel invasion.

93

3. *Be it further ordained*, That to enable to carry out the resolution aforesaid, the sum of one hundred thousand dollars be and the same is hereby appropriated out of any money in the treasury not otherwise appropriated.

$100,000 dollars appropriated.

No. 11. An ordinance to provide for the appointment of a commander of the military and naval forces of the State in subordination to the governor. Passed April 19, 1861.

Be it ordained, That the office of commander of the military and naval forces of the State, with the rank of major-general, be and the same is hereby created. The said commander shall be appointed by the governor of the Commonwealth, by and with the advice and consent of this convention; and, in subordination to the governor, shall take charge of the organization and operation of all the military and naval forces which may be called into the service of the State.

Office of major-general created.

How appointed.

Be it further ordained, That the said commander shall take rank and precedence over all other military and naval officers of the State, without regard to date of commission.

Rank and precedence over other officers.

94

No. 4. An ordinance to authorize the appointment of an advisory council. Passed April 20, 1861.

Be it ordained, That a council of three be appointed by the convention, upon the nomination of the governor, to aid, counsel, and advise him in the exercise of his executive authority in the present emergency; the said council to continue in office at the discretion of this body; provided, that the fifteenth section of the sixth article of the constitution of this State shall not apply to the office hereby created.

How many to compose the council.

How long to continue.

15th section, article 6th, of the constitution not to apply to this office.

No. 15. An ordinance to provide for the organization of staff departments for the military forces of the State,

but subsequently amended and re-enacted.) Passed April 21, 1861.

How the staff departments divided, and how composed.

Be it ordained, That the governor of Virginia is empowered and directed to organize, as the exigencies of the service may require:

1. A subsistence department, to be composed of one colonel, one lieutenant-colonel, two majors, and four captains.

2. A quartermaster's department, of one colonel, one lieutenant-colonel, two majors, and four captains.

95 3. A pay department, to be composed of four paymasters, with the rank of majors of cavalry.

4. A medical department, to be composed of one surgeon-general, with the rank of colonel of cavalry, ten surgeons, and ten assistant surgeons.

5th. An adjutant-general's department, to be composed of one adjutant-general, of the rank of colonel of cavalry, with authority to the commander-in-chief to detail as many officers as assistant adjutant-generals as the service may require.

This ordinance shall be in force from its passage.

No. 5. An ordinance defining the duties of the advisory council. Passed April 23, 1861, (but subsequently amended & re-enacted.)

Council not to control the exercise of executive functions by the governor.

1. *Be it ordained*, That in the appointment of a council of three by the convention, upon the nomination of the governor, to aid, counsel, and advise him in the exercise of his executive authority in the present emergency, it was not the purpose or intention of the convention to confer on the council the power to control the governor in the exercise of his executive functions; but it was *not* their purpose to impose upon the governor the obligation to consult the council in regard to all executive acts.

Journal of executive proceedings to be kept; votes, &c., to be recorded.

2. That a regular journal of the executive proceedings and acts should be kept, in which should be recorded all appointments and proceedings of the executive, and the votes of the several councilors thereupon.

No. 30. An ordinance to authorize the governor to exempt certain persons from military duty. Passed April 24, 1861.

Railroad employees exempt.

Be it ordained, That the governor be, and is hereby, authorized to excuse from military service such number of
96 the employees of each railroad company as may be necessary to operate the road, and to organize and arm them for the defence of the line of such road and of its termini.

No. 46. An ordinance to authorize the construction of a line of telegraph. Passed April 24th, 1861.

Telegraph lines.

Be it ordained, That the governor be authorized to have constructed a line from the city of Richmond to such point

on York River as he may select, and to defray the cost of the same from such moneys as may be raised for military purposes.

No. 2. An ordinance ratifying and confirming the convention entered into by the commissioner of the Confederate States and the commissioners of the State of Virginia. Passed April 25, 1861.

Ratification of convention between commissioner of Confederate States and commissioner of Virginia.

Be it ordained by this convention, that the convention entered into on the twenty-fourth April, eighteen hundred and sixty-one, between Alexander H. Stephens, commissioner of the Confederate States, and John Tyler, William Ballard Preston, S. McD. Moore, James P. Holcombe, James C. Bruce, and Lewis E. Harvie, commissioner' of Virginia, for a temporary union of Virginia with said Confed-
97 erate States, under the provisional government adopted by said Confederate States, be and the same is hereby ratified and confirmed on the terms agreed upon by said commissioners.

No. 3.—An ordinance for the adoption of the constitution of the provisional government of the Confederate States of America, passed April 25th, 1861.

Ratification of constitution of Confederate States.

We, the delegates of the people of Virginia, in convention assembled, solemnly impressed with the perils which surround the Commonwealth, and appealing to the Searcher of Hearts for the rectitude of our intentions in assuming the grave responsibility of this act, do, by this ordinance, adopt and ratify the constitution of the provisional government of the Confederate States of America, ordained and established at Montgomery, Alabama, on the eighth day of February, eighteen hundred and sixty-one, provided, that this ordinance shall cease to have any legal operation or effect, if the people of this Commonwealth, upon the vote directed to be taken on the ordinance of secession, passed by this convention on the 17th day of April eighteen hundred and sixty-one, shall reject the same.

Ordinance to have no legal operation if rejected by the people.

98 No. 13.—An ordinance to provide for the organization of a provisional army for the State of Virginia, passed April 27, 1861.

To consist of what.

Be it ordained, That there shall be organized a provisional army for the State of Virginia, as the exigencies of the service may require; which army shall consist, in addition to the major-general commanding the military and naval forces of the State, of four brigadier-generals, two regiments of artillery, eight regiments of infantry, on' regiment of riflemen, and one regiment of cavalry. Each regiment of artillery shall consist of one colonel, one lieutenant-colonel, one major, one sergeant-major, one quartermaster-sergeant, and ten companies; and each company shall consist of one captain, one first lieutenant, one second lieutenant, four sergeants, four corporals, two artificers, two musicians, and

Of what each regiment of artillery shall consist.

seventy-two privates. Each regiment of infantry shall consist of one colonel, one lieut.-colonel, one *one* major, one sergeant-major, one quartermaster-sergeant, two principal musicians, and ten companies; and each company shall consist of one captain, one first lieutenant, one second lieutenant, four sergeants, four corporals, two musicians, and seventy-two privates.

Of what each regiment of infantry shall consist.

99 The regiment of cavalry shall consist of one colonel, one lieutenant-colonel, one major, one adjutant, who shall be a lieutenant, one sergeant-major, one quartermaster-sergeant, one chief musician, two chief buglers, and ten companies; and each company shall consist of one captain, one first lieutenant, one second lieutenant, exclusive of the lieutenant who is to be the adjutant of the regiment, four sergeants, one of whom shall act as quartermaster-sergeant to the company, four corporals, two buglers, one farrier and blacksmith, and seventy-two privates.

Of what each regiment of cavalry shall consist.

The regiment of riflemen shall consist of one colonel, one lieutenant-colonel, one major, one sergeant-major, one quartermaster-sergeant, two principal musicians, and ten companies; and each company shall consist of one captain, one first-lieutenant, one second-lieutenant, four sergeants, four corporals, two musicians, and seventy-two privates.

Of what each regiment of riflemen shall consist.

The brigadier-general, and field-officers of the said provisional army shall be appointed by the governor, by and with the advice and consent of this convention, and the captains and lieutenants shall be appointed by the governor, by and with the advice and consent of his advisory council, and the governor shall commission the same; but in the recess of the convention, the governor may appoint the general and field officers, by and with the advice

How the officers to be appointed.

100 and consent of his advisory council, if the said officers cannot be sooner appointed; but the appointment of such officers shall be subject to ratification or rejection by the convention at its adjourned session, and their commissions shall expire upon the adjournment of the convention unless confirmed. In making all the appointments for the provisional army, preference shall be given to all worthy and efficient citizens and residents of Virginia, who have held and now hold commissions in the Army of the United States, and who have resigned or shall resign the same with a view to offer their services to this State.

Preference to be given to Virginians in the United States Army.

The major-general commanding the military and naval forces of the State shall be entitled to two aids-de-camp, who may be taken from the line without regard to rank; and he may appoint a military secretary, either from private citizens or from the subalterns of the army, who, for the time being, shall have the pay and emoluments of a captain of cavalry. Each brigadier-general shall be entitled to one aid, to be taken from the subalterns of the line; and to each regiment there shall be an adjutant, to be appointed from among the subalterns by the commanding officer of the regiment.

Major-general to appoint two aids-de-camp and a secretary.

Pay of the secretary.

101 The non-commissioned officers, musicians, artificers, farriers, and blacksmiths, and privates of the provisional army shall be enlisted for three years, unless

Term of enlistment.

sooner discharged, and the regulations for their enlistment shall be prescribed by the major-general com'd'g the military and naval forces, subject, however, to the approval of the governor and his advisory council.

Rank of officers of provisional army to take precedence.

The officers of the provisional army shall take rank and precedence over all officers of the same grade of the volunteers and militia, without regard to date of commission; and the governor may proceed at once to appoint, in the mode prescribed, the general and field officers of the provisional army, and they may be assigned to duty with their respective rank with the volunteers which have been or may be called into service.

General regulations, how prescribed.

General regulations of the provisional army and all the departments of the military and naval forces, may be prescribed by the commander of the military and naval forces, subject to the ratification of the governor and his advisory council.

Commencement.

This ordinance shall be in force from the time of its adoption, and be subject to amendment, modification, or repeal by this convention, or by the general assembly.

102 No. 14.—An ordinance establishing the navy of Virginia. Passed April 27, 1861.

Of what the navy shall consist.

Be it ordained, That the navy of Virginia shall consist of two thousand seamen and marines, in such proportions as the governor shall deem expedient, and of such officers as have availed themselves or may hereafter avail themselves of the invitation of this Commonwealth to worthy and efficient Virginians, and residents of Virginia in the Navy of the United States, to retire therefrom and to enter the service of this State. The rank of such officers shall not be reversed, and they shall have at least a rank equal to that held in the United States Navy.

Rank not to be reversed.

Organization, pay, rations, &c.

2. The organization of the navy shall be prescribed by the governor, and the pay, rations, and allowances shall be the same with those of the United States Navy at this present time.

Virginians on the reserved-list in the United States Navy to be provided for by the governor.

3. Virginians and residents of Virginia on the reserved-list of the United States Navy, who resigned and desire to enter the service of the State, may be provided for by the governor, by allowing them the same pay they received in the United States Navy, and requiring from them such duties as they are competent to discharge.

Rules of the United States Navy to be revised and promulgated.

103 4. The rules from the Government of the United States Navy at this present time shall be revised by a board of officers ordered by the governor, and made applicable to the navy of Virginia, and shall then be promulgated as the rules governing the said navy.

Term of enlistment.

5. The term of enlistment in the navy shall be three years for seamen and five for the marines. Boys not under thirteen may be enlisted with the consent of their parents or guardians. Proper regulations for enlistment shall be prescribed by the governor.

Medical department; who to be appointed thereto.

6. A medical department shall be organized by the governor; but no person shall be appointed thereto who has not been a surgeon or assistant surgeon in the Navy of the United States, or been examined and approved by a board of surgeons designated for the purpose.

No. 17.—An ordinance in respect to confirmation by the conventions, passed April 27, 1861.

Convention to confirm appointments above lieutenant-colonel.

Be it ordained, That no appointment of officers of volunteers above the rank of lieutenant-colonel shall be valid until confirmed by the convention, unless made during the recess of the convention; and in such case the ap-
104 pointment, unless subsequently confirmed, shall be deemed vacated on the adjournment or recess of the convention; and all such appointments heretofore made shall be sent into the convention for confirmation or rejection.

Exception.

And rested his case.

And thereupon the defendant, by his counsel, submitted to the court the following propositions, and asked its judgment upon them in favor of the defendant, to wit:

1st. The alleged contract said to be contained in the letters of Silas Omohundro to Littleton Omohundro and Louisa Tandy, otherwise called Louisa Omohundro, being made on and after the 26 day of April, 1861, when the said Omohundro resided in Virginia, and the plaintiff resided in Cincinnati, and Virginia was then one of the Confederate States, then at war with the Government of the United States, the said contract was illegal and void.

2nd. That if not actually void it was an executory agreement and was terminated by the war.

3d. That if a valid contract, it was too indefinite to be executed and was a contract for present relief, and not in the nature of a continuing guarantee.

105 4th. That no interest is recoverable during the war, or any portion of the war, upon a contract between alien enemies.

5th. That, upon the whole case, upon the issues joined, judgement should be for the defendant. But the court refused so to decide, and ruled against the defendant upon each of the propositions, and the defendant excepted to the said ruling.

And the court then proceeded to render the following judgment, (judgment heretofore entered.)

And the defendant moved the court to arrest the same, and grant him a *a* new trial, because the judgement was contrary to the evidence and the law, and in support of said motion assigned for error the same matters and causes hereinbefore stated; but the court overruled the said motion and the defendant excepted, and prays that this his bill of exceptions may be signed, sealed, and reserved to him; which is done accordingly.

HUGH L. BOND. [SEAL.]

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107 Circuit court of the United States of America, eastern district of Virginia:

RICHARD COOPER, EXECUTOR OF SILAS OMOHUNDRO, a citizen of the State of Virginia, plaintiff in error,
vs.
LITTLETON J. OMOHUNDRO, A CITIZEN OF THE State of Ohio, defendant in error.

Know all men by these presents, that we, Richard Cooper, executor of Sjlas Omohundro, dec'd; Richard Cooper and James Lyons are held and firmly bound unto Littleton J. Omohundro, in the sum of five thousand dollars to be paid to the said Littleton J. Omohundro, his heirs, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this 31st day of May, A. D. 1871.

Whereas the above-named Richard Cooper, executor of Silas Omohundro, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Virginia:

Now, therefore, the condition of this obligation is such, that if the above-named Richard Cooper, executor of Silas Omohundro, dec'd, shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

R. COOPER, *Ex'r*, [SEAL.]
Ex'or of Silas Omohundro.
R. COOPER, [SEAL.]
JAMES LYONS. [SEAL.]

Sealed and delivered in presence of—
M. F. PLEASANTS, *Clerk.*

108

109 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judge of the circuit court of the United States for the eastern district of Virginia, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between Richard Cooper, executor of Silas Omohundro, pl't'ff in error, and Littleton J. Omohundro, def't in error, a manifest error hath happened, to the great damage of the said Richard Cooper, ex'r of Silas Omohundro, as by complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the day of next, in the said Supreme Court, to be then and there held,

that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein, to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 31st day of May, in the year of our Lord one thousand eight hundred and seventy-one.

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States
For the Eastern District of Virginia.

Allowed by Hon. Hugh L. Bond, judge, &c., &c.

110

111 THE PRESIDENT OF THE UNITED STATES OF AMERICA, *to wit:*

To Littleton J. Omohundro, a citizen of the State of Ohio, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington, on the 1st Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Virginia, wherein Richard Cooper, executor of Silas Omohundro, a citizen of the State of Virginia, is plaintiff and the said Littleton J. Omohundro is defendant, in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hugh L. Bond, justice of the circuit court of the United States, this 31st day of May, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.]

HUGH L. BOND,
Judge of the Circuit Court of the United States
for the Eastern District of Virginia.

112

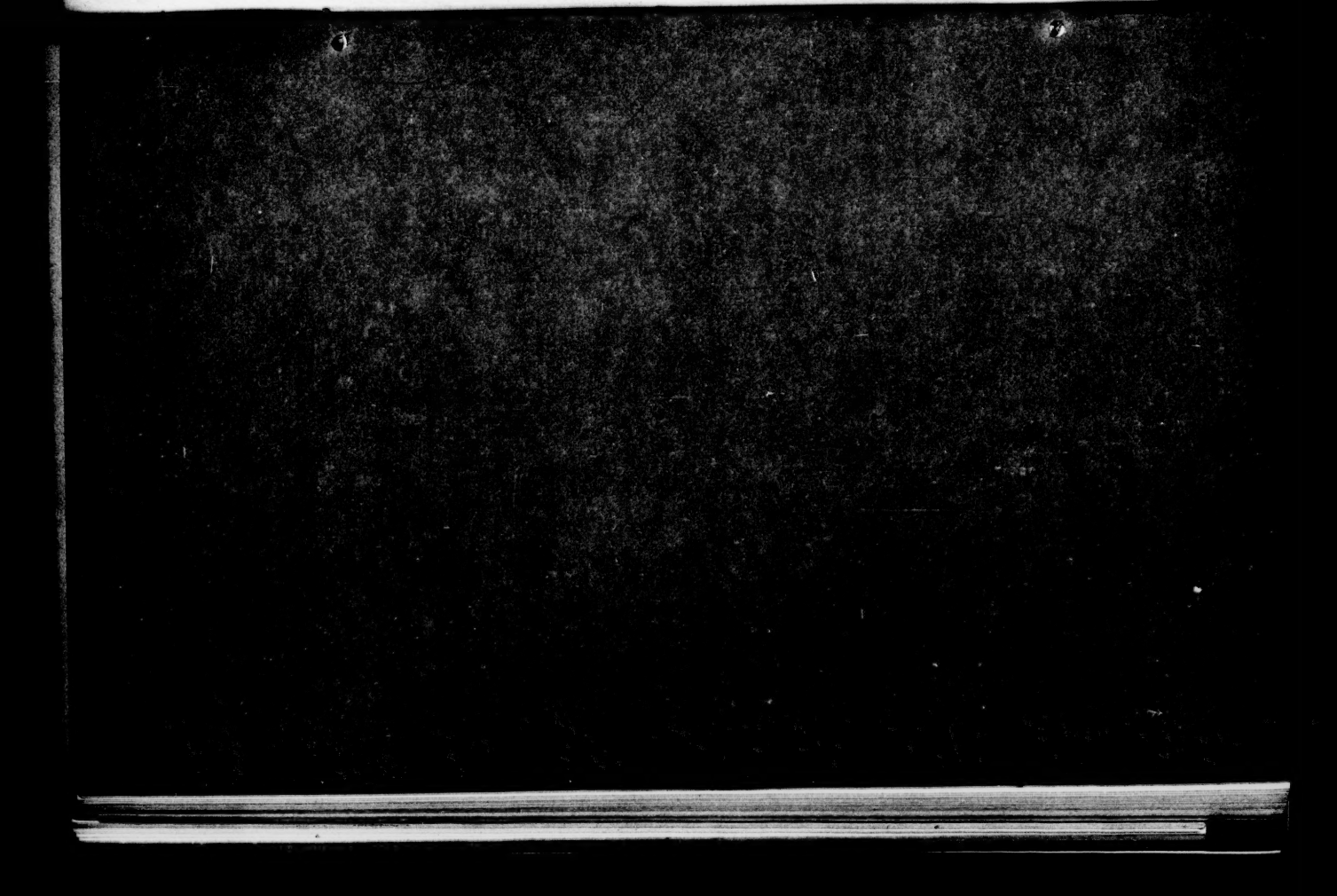
113 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify that the foregoing is a true and complete transcript of the record, process, and proceedings in a suit determined in said court, wherein Richard Cooper, ex'or of Silas Omohundro, dec'd, is plaintiff in error, and Littleton J. Omohundro is defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, in said district, this 6th day of July, A. D. 1871, and of our Independence the 96th year.

[SEAL.] M. F. PLEASANTS, *Clerk.*

(Indorsement on cover:) No. 386. Richard Cooper, ex'or of Silas Omohundro, dec'd, plaintiff in error, vs. Littleton J. Omohundro. E. Virginia. C. C. U. S. Filed 17th May, 1872.



Supreme Court of the United States.

OCTOBER TERM, 1873.

RICHARD COOPER, *Executor*,
vs.
LITTLETON J. OMOHUNDRO. } No. ~~193~~ 775

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes up by writ of error to the Circuit Court of the United States for the Eastern District of Virginia.

The defendant here was plaintiff below, and recovered judgment, which this writ is brought to reverse.

The Case.

Omohundro sued Cooper, as executor of Silas Omohundro, to recover the sum of $4,391 with interest, moneys loaned and advanced, and laid out, and expended at the request of the deceased. (Rec., pp. 1, 2.)

The case was tried by the court without a jury, upon a stipulation filed (Rec., p. 4,) and the court gave judgment for the plaintiff. The evidence for plaintiff and defendant, and the rulings of the court, are embodied in the bill of exceptions. The evidence for the plaintiff, in Rec., pp. 4 to 18 inclusive; that for defendant, Rec., pp. 19 to 40; and the rulings, p. 41.

The defendant requested the judge to rule upon certain propositions of law applicable to the case. The court refused to decide the said proposition as requested by the defendant, but on the contrary, "ruled against the defendant upon each of said propositions, (and the defendant excepted to the said ruling,) (Rec., p. 41, fols. 104, 105), and then rendered judgment for the plaintiff for the advances and interest.

The facts which the evidence tended to prove were, that Silas Omohundro, the deceased, living in Richmond, Va., had a female slave named Louisa Tandy by whom he had, in Virginia, one or two children. He removed her to Cincinnati and established and supported her there, and was accustomed to visit her annually, and had by her, in Cincinnati, four children. She seems to have passed there for a white woman, and at some time, probably recently, the woman and her children, took his name of Omohundro, and seem to have claimed that there was a marriage. But the deceased is not shown ever to have acknowledged that relation, but, on the contrary, when, in 1847, he purchased for her a lot in the city of Cincinnati, he conveyed it to her by the name of Louisa Tandy. (Rec., p. 31.) On this lot he built her a house which was completed and paid for in the year 1861. The property thus given her is stated to be worth $10,000.

One of Louisa's children, a son, was of age at that time.

The deceased was in correspondence with him in the spring of 1861, about the building of the house and payment for the work.

In one of these letters, dated the 28th of April, 1861, (Rec., p. 16,) he requested the plaintiff to let his mother have money to pay rent and live on, and, also, to settle with the builder of the house, promising to foot all bills when it should be in his power to do so; and the plaintiff claimed to have advanced his mother $3,900 during the war, and to have paid the builder $491.

These sums he sought to recover, with interest, on the respective advances, say, from April 1, 1862, April 1, 1863, April 1, 1864, June 24, 1864, and Dececember 9, 1861. (Rec., pp. 2, 3.)

The propositions of law which the defendant requested the court to rule in his favor were:

1. That the contract said to be contained in the letters of Silas Omohundro, being made on and after the 26th of

April, 1861, between a resident of Virginia and a resident of Ohio, was void.

2. If not void it was executory, and was terminated by the war.

3. If valid it was too indefinite to be executed.

4. That no interest was recoverable during the war.

5. That upon the whole case judgment should be given for defendant.

Assignment of Error.

The court erred in refusing to rule in favor of the defendant upon the questions of law so proposed, and in ruling to the contrary thereof.

I.

The entire contract arose after the 28th April, 1861.

There is a letter of April 10, 1861, in the record (p. 15), but this not only contains no request or authority to the plaintiff to pay money for any purpose, but expresses the determination of the deceased to pay it himself. A letter of 26th April requests the plaintiff to make a certain payment to the builder on account of the building (record, p. 15), but this request was revoked by the letter of 28th April (record, p. 16), and no such payment was or is alleged to have been made. The first and only payment to the builder is charged to have been made on the 9th of December, 1861.

If any advances were made by the son to the mother, or payment to the builder, under the letter of the 28th of April, 1861, or any subsequent letter, they must necessarily have been subsequent to that date, and could furnish no lawful consideration for a contract to repay the money so advanced, because on the 27th of April, 1861, the President had already issued his proclamation blockading the ports of Virginia, and this proclamation was "official and conclusive evidence that a state of war existed which de-

manded and authorized a recourse to such a measure." Prize Causes, 2 Black, p. 670.

A state of war then actually existing on the 27th day of April, 1861, no contract could arise between the parties thereafter. "The idea that any commercial intercourse or pacific dealing can lawfully subsist between the people of the powers at war, except under the clear and express sanction of the government, and without a special license, is utterly inconsistent with the new class of duties growing out of a state of war." 1 Kent, 66, and cases cited.

This doctrine has been uniformly enforced by this court as a stern rule, independent of all questions of natural justice and equity.

II.

The settled operation and effect of the rule last above insisted on renders it in our judgment unnecessary to insist on the third and fourth exceptions; but without abandoning these points, we refer to the accompanying argument of Mr. Lyons for a discussion of them.

Conclusion.

We submit the judgment should be reversed.

J. M. CARLISLE,
J. D. McPHERSON,
For Plaintiff in Error.

In the Supreme Court of the U. S.

OMOHUNDRO'S EX'OR vs. OMOHUNDRO. } *Statement of the Case for the Plaintiff in Error.*

Littleton J. Omohundro, instituted an action of assumpsit against the ex'or of Silas Omohundro, in the Circuit Court of the United States at Richmond, to recover the sum of $4,390, with interest, upon an account filed (at page 11), which is in the following words and figures, to-wit:

EXHIBIT "A."

CINCINNATI, OHIO, April 28, 1869.

Mr. SILAS OMOHUNDRO, Richmond, Va.

To LITTLETON J. OMOHUNDRO, Dr.

To sundry amounts paid by direction of Silas Omohundro as follows, viz.:

1861.		
Dec'r 9—	To amount paid Warren H. Brown, on account of building house,	490 00
1862.		
April 1—	To amount paid Louisa Omohundro for support of herself and children,	1,200 00
1863.		
April 1—	To amount paid Louisa Omohundro for support of herself and children,	1,200 00
1864.		
April 1—	To amount paid Louisa Omohundro for support of herself and children.	1,200 00

1864.

June 25— To amount paid Louisa Omohundro for support of herself and children. 300 00

$1,390 00

Upon which were the following endorsements: W. H. Brown. Sidney Omohundro. Attest: S. S. Carpenter, U. S. Com'r S. D. O.

EXHIBIT "B."

Received, CINCINNATI, December 9, 1861, of Littleton I. Omohundro, his note for two hundred dollars, at twelve months after date, with interest, said note being in full for contract of building dwelling-house for four thousand, two hundred dollars, with Silas Omohundro.

WARREN H. BROWN.

EXHIBIT "C."

Received, CINCINNATI, Dec. 9, 1861, of Little I. Omohundro, two hundred and ninety dollars, being in full for all extra work done on dwelling-house, on Smith street, between Fourth and

Marked W. H. BROWN. Attest: S. S. CARPENTER, U. S. Com'r S. D. O.

And other Exhibits, page 12 to 15.

To this action the defendant pleaded *non assumpsit*, and that Silas Omohundro and the plaintiff were alien enemies at the time of the alleged contract, because of the war existing between the Confederate States of America and the United States.

Upon these pleas issue was joined, and by written agreement the cause was submitted to the Court, instead of to a jury to try it.

Upon the trial of the case, the plaintiff proved several letters from Silas Omohundro to W. H. Brown and Littleton J. Omohundro, which are dated respectively at Richmond, on the 19th, 26th, 27th, and 28th of April, 1861, and May 9th, July 2d, and July 20th, 1861, and August 1st, 1861, and directed to them at Cincinnati.

The letter of the 27th of April is addressed to W. H. Brown, and directs him to discontinue certain building, because it was

impossible for the writer to procure remittances; but in the latter part of it says that he has purchased a draft on New York for two thousand dollars, at six per cent. which he remits to him, promising to remit $3,000 more in May and June, but he cannot arrange more at present, although he has $18,550 in Bank.

The next letter of July 2 (page 13), is directed to the same person (W. H. Brown), and shows the writer's inability to make any remittances because of the state of the country.

The letter of the 10th of April is directed to nobody, but produced by the plaintiff, and contains the following language: "It does now appear we will have war at last, and if so it will be a very hard time on me about building, but Mr. Brown has progressed too far to turn back, so he must go ahead."

That letter (page 15), directs that Mr. Brown must stop the house, unless Littleton Omohundro can make arrangement to use $2,500 which Silas Omohundro had put at his disposal, and wait for reimbursements with 10 per cent. interest, as it is impossible to remit money.

The letter of April 28th (page 16), is addressed to nobody, but produced by Littleton Omohundro, and tells him that all intercourse by mail between Richmond "and the North" has been stopped since the 19th of April, 1861.

The letter of the 19th of May is addressed to Louisa Omohundro, and says, "as I cannot get a check upon none of the Northern cities upon no terms, you must tell Littleton to let you have as much money as you want, and I will pay him the same per cent. he is getting (10 per cent.) as it is impossible now for me to send you money on any terms although, I have it."

The letter of July 2nd shows the same difficulty, an impossibility of remittances, and therefore inability to pay Mr. Brown, although the writer says he has a large amount of money in bank.

The plaintiff offered evidence for the purpose of proving that he had paid to Louisa Omohundro twelve hundred dollars on the first of April, '62, twelve hundred dollars April, 1863, and three hundred dollars on June 25th, 1864, by the authority of the letters of Silas Omohundro dated the 28th of April and 19th of May, 1861.

Evidence was offered also for the purpose of proving the payment of money to Brown—to prove that Louisa Omohundro

was a colored woman, who had been a slave of Silas Omohundro, who was carried by him to Cincinnati with some of her children, and there supplied with property to the value of $15,000—that Littleton Omohundro and the other children were the illegitimate children of Silas Omohundro by that slave, and that one was the illegitimate child of some other person, residing in Cincinnati, by the same woman.

The defendant also proved the will of Silas Omohundro devising his property to a woman whom he calls Corinna Omohundro (whom he emancipates), and to his children by her in Virginia.

The defendant also proved the ordinance of Virginia passed on the 17th day of April, 1861, repealing the ratification of the Constitution of the United States by Virginia, and declaring that it shall be no longer binding.

He also offered in evidence another ordinance passed on the same day, to raise troops, and inviting all of the official and worthy Virginians in the army and navy of the United States to resign therefrom and to enter the service of Virginia, with directions to the Governor to repel invasion and to take care of the Commonwealth, and appropriating $100,000 for the purpose. Also an evidence to provide for a Commander-in-Chief of the military and naval forces of Virginia; to organize a quarter-master's department, and to ratify the convention which had been formed between the Confederate States of America and the State of Virginia; an ordinance for the adoption of the Provisional Government of the Confederate States; an ordinance passed on the 27th of April, to provide for the organization of a Provisional army for Virginia, and another for establishing a Navy, and then the case being rested, the defendant asked the Court to decide

1st. The alleged contract said to be contained in the letters of Silas Omohundro to Littleton Omohundro and Louisa Tandy, otherwise called Louisa Omohundro, being made on and after the 26th day of April, 1861, when the said Omohundro resided in Virginia, and the plaintiff resided in Cincinnati, and Virginia was then one of the Confederate States, then at war with the United States, the said contract was illegal and void.

2nd. That if not actually void, it was an executory agreement and was terminated by the war.

3rd. That if a valid contract, it was too indefinite to be executed and was a contract for present relief, and not in the nature of a continuing guarantee.

4th. That no interest is recoverable during the war, or for any portion of the war, upon a contract between alien enemies.

5th. That upon the whole case upon the issues joined judgment should be for the defendant.

But the Court refused so to decide, and ruled against the defendant upon each of the propositions and the defendant excepted to the said ruling; and the Court rendered judgment for the plaintiff for $4,391 with interest from June 24, 1864.

In this Court the plaintiff in error will insist that the Court erred upon every point.

I. Because a state of war was existing between Virginia and Ohio by reason of the war between the United States and the Confederate States, and by the laws of Nations, and the laws of the United States, Silas Omohundro and the plaintiff were on the 9th of May, 1861, and thereafter alien enemies, and the alleged contract between them was void, all contracts between alien enemies made after the war commenced being absolutely void. See Lawrence's, Wheaton's International Laws, Ed. 1863, Part IV. chap. I., page 552-556. Wheaton's Elements of International Law, Ed. 1866, part IV., § § 309, *et seq.* page (bottom) 392., Ib. § § 316, *et seq.*, *Ex parte* Boussmaker, 13 Vesey p. 71, 3 Campbell pp. 152, 153. 1 Chitty's Pleading, 9 Am. Ed. p. 447.

The President of the United States by his proclamation on the 15th day of April, 1861, declared that war did exist between the United States and the Confederate States, and called upon Virginia to furnish her quota of troops to aid the United States, flagrant war being then in existence between the United States and the Conferate States at Fort Sumpter, and in consequence of that proclamation Virginia withdrew from the Union two days afterwards, joined the Confederate States, and made the necessary provisions, by law, of raising, organizing, arming and equipping an army and navy.

War does not wait for formal declarations, but redress by any forcible means constitutes war, which is fully explained by Wheaton, (Lawrence) part IV., chap. I, p. 505; and besides the proclamation of the President before mentioned, and the Acts of

Virginia, the Congress of the United States as early as the 13th of July, 1861, cut off all intercourse with the insurgents, as they were called, and by successive statutes made all the necessary preparations for prosecuting the war, 2 Brightley's Digest, 191, and this Honorable Court has decided in various cases, that war existed as early as the 19th of April, 1861, prior to any congressional recognition of the war, "Prize Cases," 2 Black's Reports, p. 635. And in various cases it has also decided that according to the law of Nations all the citizens of the opposing sections were enemies—that all intercourse between them was illegal, and all contracts between them made after the commencement of the war were void. *The Circasian*, 2 Wall. 135; and in Mrs. Alexander's cotton case, 2 Wall. 404, the Court decided that it could not "look into the personal character and dispositions of individual inhabitants of enemy territory, but must be governed by the principle of public law, so often announced from this bench that all the people in each State or District in insurrection against the United States must be regarded as enemies."

Hanger *vs.* Abbott, 6 Wall. 534; The Hampton, 5 Wall. 372. The William Bagley, 5 Wall. 377; Moon & Bro. *vs.* Foster & Moon, decided by C. J. Chase at Richmond, and referred to in note in Billgerry *vs.* Branch & Sons, 19 Gratt. (Va.) Reports, 393; United States *vs.* Rice, 4 Wheaton 246; Bella Guidita, 1 Robinson's Admiralty Rep. 196, 207, 1 Kent's Com. 67, 68; Griswold *vs.* Waddington, 16 Johnson 438; Halleck's Institutes of International Law, 357; 11 Exchequer Reports, note a, to the case of Clemmonston *vs.* Blessig, page 141; Willison *vs.* Patterson, 7 Taunton 439; 1 I. B. Moore, 133; Jecker et als *vs.* Montgomery 18, Howard 110; The Rapid, 8 Cranch 155; 3 Condensed Reps. of Supreme Ct. 142; Exposito *vs.* Bowden, 4 Ellis & Blackburn, Q. B., E. C., L. R., vol. 82, p. 962; The Francis, 1 Gallison 448; Chitty on Contracts, 172. 589; Scholefield *vs.* Eichelberger, 7 Peters 589; Reade *vs.* Haskins, 82 E. C. L. R., 979.

If it be said that this is a case of a man supplying his family or his sons, the answer is that owing to the *status* of the parties they are beyond the pale of that doctrine if such a one were recognized by law; but neither the law of Nations nor the municipal law of the United States recognizes any such distinction; and in Mrs. Alexander's cotton case, this Honorable

Court expressly repudiated in the passage above quoted, the idea of distinction between persons, who violated the laws of war or the municipal law.

The law of Nations even more than the municipal law is emphatic in declaring that all contracts made by all persons in time of war, who are enemies, are void.

If it were possible to make such a distinction the impropriety of it must be obvious to every one. In all public wars, and especially was it so in the late war between the Confederate and United States, fathers and sons, and brothers were found in the opposing ranks, and if the blood relationship between them could create a distinction, an officer or soldier in one army might furnish any amount of money or stores to an officer or soldier in the opposing army, and the connection between husband and wife would be considered at least as strong as that between brothers, or between brother and sister, and a wife might be made the means, or conduit for sending any amount of supplies to her husband. The fatal effects of such practice are too obvious to require argument or explanation.

II. But if the court could sustain the contract, then the question arises, what is the extent of it? Is it a continuing guarantee, or only a present and limited undertaking? If a continuing guarantee, how long was it to run, and for what amount? It would be unlimited in amount as in duration, and was suspended by the war as certainly as executory agreements were if valid in their inception. The true rule for the interpretation of guarantees as now settled is, to execute the intent as far as it can be gathered from the words, without regard to particular expressions, and if therefore from the language and all the circumstances surrounding, it may be fairly inferred that the guaranty was intended to be limited and not indefinitely continuing, it will be so construed. Cremer vs. Higginson, 1 Mason R. 323; White vs. Reid, 15 Conn. 457; Boyce vs. Ewart, 1 Rice, 126; Fellows vs. Prentiss, 3 Denio, 512; Whitney vs. Groot, 24 Wend. 82.

But it is most manifest from the terms of the guarantee that it was not intended to be of unlimited amount or duration, certainly not intended to run for the lifetime of the guarantor, as by the decision of the court it was made to do.

The letter of Silas Omohundro, dated April 28, 1861, which is

relied upon as containing the guaranty continuing and for an indefinite amount, is directly the reverse, for it shows the difficulty of making remittances, and the high premium, and uses this language: "I want you to try and arrange to let your mother have some money to pay her house rent, and to live on," and also expresses his desire that Mr. Brown should finish a house for her to live in, in order to save house rent, and says: "I can't send any more money shortly," and adds, "You must all arrange matters the best way you can, as I cannot help myself, but will foot all bills as soon as it is in my power to do so." He then sent two thousand dollars to be paid to Brown for the house.

And in a letter dated April 26, 1861, it appears that he expected any advances which should be made out of $2,500 which he had put into the hands of Littleton Omohundro previously, and which had been put out at 10 per cent. interest, but then Brown was to be paid $2,000 out of that money which was afterwards paid by Silas Omohundro according to the letter of the 28th of April.

These letters ascertain—

1. That the amount to be advanced, was to be only enough to pay house rent and for Louisa Omohundro to live upon.

2. That they were not expected to exceed $2,500, and the account exhibited by the plaintiff, and the testimony of Brown, show that the house was finished and paid for early in December, 1861; so that the only house rent chargeable was from April 26 to December 9, 1871, whereas the first amount charged as having been paid to Louisa Omohundro is $1,200, for the support of herself and her children, as having been paid April 1, 1862, without any account for house rent at all, showing what was paid for that, and so annually until June, 1864, when Silas Omohundro died.

Now we submit—

1. That it was the duty of the plaintiff, if he could recover at all, to show the amount paid for house rent, and he is entitled to recover nothing for house rent because he did not do so, and so the guaranty was in that respect limited.

2. That it was his duty to produce the bills for "living" actually paid, and he was not authorized to advance at the com-

mencement of a year so large a sum as $1,200, and charge it to the defendant, so the guaranty is in that respect limited.

But whether a continuing guaranty or not, there being no sum of money specified in it, and no time expressly limiting the duration of the guaranty, no liability accrued under it unless notice was given of its acceptance by the plaintiff. The importance of that acceptance is too obvious and too well defined in the cases upon the subject to require argument.

A guaranty is a contract, and like every other contract, requires two parties, and until therefore it is accepted by the person to whom it is addressed, it is no contract. The consequences to the guarantor of a different rule would be ruinous, for it is at all times in his power to terminate a guaranty by notice; but when he has no knowledge that the guaranty has been accepted, that he is under no liability, and the holder of the guaranty may let it run for ten years, and then, as in this case, after the death of the guarantor, bring forward a claim which might consume his whole estate, while if he had been notified of the acceptance of the guaranty he would have taken care to terminate it by notice.

It is quite impossible, therefore, that a man would have made a guaranty for an indefinite amount, and permitted it to run for a life time, even in favor of his most favorite child. 'Twere better at once to give half his estate, and thus know that he had something which he might leave to his wife and his other children. The law, therefore, has been tersely and aptly expressed by the Supreme Court in the case of Lee *vs.* Dick, 10 Peters 482, when it declared "that a guaranty or letter of credit is future in its application and uncertain in its amount, the guaranter must have notice of his acceptance or he is not bound by it." So in Adams *vs.* Jones, 12 Peters 297; Parsons on Contracts, vol. 1, p. 500; and authories cited in note 7; Chitty on Contracts, p. 548, and the authorities cited in note g. 1.

This case more strikingly illustrates perhaps than any other that has occurred, the importance of adhering to the rule, for the claim was permitted to run on until the death of the guarantor without notice of acceptance until he died, during a state of war, in itself affording the strongest reasons to believe that there was no liability hanging over him, and if he had lived ten years longer, and the war had lasted as long, or whether it did

relied upon as containing the guaranty continuing and for an indefinite amount, is directly the reverse, for it shows the difficulty of making remittances, and the high premium, and uses this language: "I want you to try and arrange to let your mother have some money to pay her house rent, and to live on," and also expresses his desire that Mr. Brown should finish a house for her to live in, in order to save house rent, and says: "I can't send any more money shortly," and adds, "You must all arrange matters the best way you can, as I cannot help myself, but will foot all bills as soon as it is in my power to do so." He then sent two thousand dollars to be paid to Brown for the house.

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2. That it was his duty to produce the bills for "living" actually paid, and he was not authorized to advance at the com-

mencement of a year so large a sum as $1,200, and charge it to the defendant, so the guaranty is in that respect limited.

But whether a continuing guaranty or not, there being no sum of money specified in it, and no time expressly limiting the duration of the guaranty, no liability accrued under it unless notice was given of its acceptance by the plaintiff. The importance of that acceptance is too obvious and too well defined in the cases upon the subject to require argument.

A guaranty is a contract, and like every other contract, requires two parties, and until therefore it is accepted by the person to whom it is addressed, it is no contract. The consequences to the guarantor of a different rule would be ruinous, for it is at all times in his power to terminate a guaranty by notice; but when he has no knowledge that the guaranty has been accepted, that he is under no liability, and the holder of the guaranty may let it run for ten years, and then, as in this case, after the death of the guarantor, bring forward a claim which might consume his whole estate, while if he had been notified of the acceptance of the guaranty he would have taken care to terminate it by notice.

It is quite impossible, therefore, that a man would have made a guaranty for an indefinite amount, and permitted it to run for a life time, even in favor of his most favorite child. 'Twere better at once to give half his estate, and thus know that he had something which he might leave to his wife and his other children. The law, therefore, has been tersely and aptly expressed by the Supreme Court in the case of Lee *vs.* Dick, 10 Peters 482, when it declared "that a guaranty or letter of credit is future in its application and uncertain in its amount, the guaranter must have notice of his acceptance or he is not bound by it." So in Adams *vs.* Jones, 12 Peters 297; Parsons on Contracts, vol. 1, p. 500; and authories cited in note 7; Chitty on Contracts, p. 548, and the authorities cited in note g. 1.

This case more strikingly illustrates perhaps than any other that has occurred, the importance of adhering to the rule, for the claim was permitted to run on until the death of the guarantor without notice of acceptance until he died, during a state of war, in itself affording the strongest reasons to believe that there was no liability hanging over him, and if he had lived ten years longer, and the war had lasted as long, or whether it did

or not, at the death of the guarantor the estate might have been found to be utterly insolvent, and his wife, if he had one, and his other children paupers. The rule of interpretation of guarantors, as laid down by the authorities, is that it shall be strict but reasonable, and certainly the interpretation which would sustain this guaranty for the amount claimed under it would be anything but reasonable.

III. It was error to give interest during the war.

The court seems to have been in rather a confused condition in regard to the interest, for if interest was recoverable at all, it was recoverable upon each payment or advance as it was made; but the court denied that, and yet gave interest upon the whole amount from the 24th of June, 1864, nearly one year before the war terminated; but we repeat that it was error to allow interest at all during the war. Ward vs. Smith; 7 Wall, 447.

IV. Upon the whole case the finding should have been for the defendant, not only for the reasons already assigned, but because by no reasonable interpretation of the letters relied upon as the guaranty, can they be made to authorize expenditures for the maintenance and support of the plaintiff and his brothers who were engaged in lucrative employment, and one or more of the sisters, who were married, and their husband or husbands. The utmost that can be made of the words would justify only pre sent advance for the maintenance of his former concubine, and such of his children by her as were not capable of maintaining themselves. Any other interpretation of the contract would put it in the power of Littleton Omohundro to contract a debt for Silas Omohundro which would have utterly ruined him, and Silas Omohundro was certainly under no impression that he was in any wise indebted to the plaintiff or any of his family at the time that he died, for in his will he makes not the most distant allusion to them, but devises his whole estate to his other children and their mother.

J. M. CARLISLE
and JAMES LYONS,
Counsel for the Plaintiff in error.

In the Supreme Court of the U. S.

OMOHUNDRO'S EX'OR
vs.
OMOHUNDRO.

Reply to the Defendant's Brief.

The first point made by the defendant's counsel is that this Court cannot take jurisdiction of the case because, as he supposes, the case being submitted to the Court, there has been a general finding for the plaintiff; and upon the authority of Dirst vs. Morris, 14 Wall, 484, the plaintiff in error is wholly without redress, no matter how erroneous the decision of the Court may have been. This would be true, although very hard, if this case came within the reasoning or the adjudication of that case; but I respectfully submit that it does not. By "general finding," the Court obviously, and indeed necessarily, means a case in which the parties have referred all the questions of law and fact to the Court without invoking its judgment upon the law of the case, and affording to the Appellate Court no means of knowing what the opinion of the Court below is upon the law, and therefore affording it no means of correcting its error, if, indeed, it entertained an erroneous opinion upon the law—*non constat* that the Court would not have expounded the law correctly if asked to do so, and for aught that can be told the judge may not even entertain an erroneous opinion about the law, and decided the cause upon the insufficiency of the facts to bring the case

within the law. In Dirst vs. Morris, therefore, this honorable Court said "the particular reason or ground on which the Court decided that the plaintiff was entitled to recover is not specified: the Court was exercising the functions of both court and jury, and whether, as matter of fact, it regarded the proof sufficient to show that Breese had been served with process in the foreclosure suit, or whether, as matter of law, it regarded that fact as not material, or what other view of the case it may have taken does not appear, and therefore no error can be asserted in the decision." But this case falls within neither of the categories of that opinion; for, all the facts being spread upon the record, the Court was asked to say what the law was, and there is, therefore, no difficulty in ascertaining the "ground on which the plaintiff was entitled to recover."

To say that in such a case the error of the Court cannot be corrected, although it is plainly apparent, would be to put an interpretation upon the statute which neither justice nor common sense would justify, and would be equivalent to saying that when parties agree to submit a cause to the Court, they submit themselves, not to its learning and judicial discretion, but to its ignorance or caprice, although the motive, undoubtedly, of every person who submits a cause to the Court instead of a jury is that he may have a wiser and better decision.

It is the province always of the Court to expound written documents, and to decide upon their legal effect; but if the view of Dirst and Morriss taken by the counsel for the defendant be correct, then if a cause be submitted to the Court which turns entirely on the effect and meaning of a written document, and the Court being asked to expound it, plainly erred, the error could not be corrected; so also upon a demurrer to evidence; it is the duty of the Court to decide the case, and say whether, according to law, the plaintiff has made out his case or not; and yet, under the view of Dirst vs. Morriss, which I am combatting, although the

decision might be palpably erroneous to the vision of this honorable Court, it would be its duty to say that it saw no error, because the inferior Court did not tell it why it sustained or overruled the demurrer. I am satisfied that this honorable Court never meant to announce so extraordinary an opinion as that would be; but if it did, still this case would not be within its range, for here each proposition was disintegrated, and the opinion of the Court invoked and given upon it, and then it was asked to give its opinion upon the whole in concrete.

In what more precise and distinct form, I beg to know, the opinion of the Court could be obtained in any cause than it has been in this, unless it be true that the parts are not equal to the whole, and the whole does not embrace the parts? and then things which are equal to the same are *not* equal to each other.

Again: take the first proposition which was propounded to the Court below, in which it was asked to say that the contract therein set forth, upon the facts stated, was void for the reason there given, to wit: that it was made during war between alien enemies; and the Court decided that it was not void.

Is there any difficulty in ascertaining upon what ground that decision was made? and was there any other mode known to lawyers by which that opinion could have been obtained than the one which was adopted by the plaintiff in the Court below?

Or take the third and fourth propositions:

The third asked the Court to expound the contract and say that it was not a continuing guaranty, and the Court refused to do it; thereby affirming that it was a continuing guaranty.

The fourth proposition asked the Court to say that interest upon the contract was not recoverable during the war, but the Court refused so to decide, thereby deciding that interest was recoverable; and it gave interest accordingly.

See 9 Wall 125 - Norris v Jackson
Wall

The second proposition maintained by the counsel for the defendant in error is that the laws of civil war and regular war are not the same.

The opinion is a peculiar one, and not sustained, I respectfully submit, by the authority of any publicist or court, but the contrary is expressly laid down by this Court in the authorities before cited, and in the most precise terms, and by Wheaton in his law of Nations (Lawrence) chap. I, pp. 523, 526, 535, 555, 556.

The third point is that the parties in this case are not persons subject to the laws of war.

The authorities already cited in our brief, and especially Mrs. Alexander's cotton case in 2 Wall, answer this objection fully and conclusively.

The law recognizes no distinction of persons where they respectively reside in the countries or nations at war. All such persons are alien enemies, and all contracts between them made *flagrante bello* are void; and all contracts between them made before the war are suspended during the war.

Much reliance is placed by the counsel for the defendant upon the case of Kershaw vs. Kelsey, 100 Mass. R p. 572; but I respectfully submit that it does not bear upon this case at all, because the facts are wholly different.

In that case, two parties residing at the time in the State of Mississippi, although one of them was before and after the war a citizen of Massachusetts, made a sale, one to the other, of a tract of land in Mississippi. The publicists, and this honorable Court, all have affirmed the validity of such an act, because no law prohibited it, and the resources of neither nation were increased nor diminished by it.

The fourth point made by the counsel for the defendant in error is, that it does not appear that the opinion of the Court was asked upon the whole evidence; but I submit, with all respect, that this is a mistake. At page 19 of the record, the Court will find that after much of the testimony is recited, on the part of the plaintiff, it is stated that he

"rested his case," which, as we all know, and the words import, mean, that he had offered all the testimony which he desired to offer; and then the defendant gave his evidence, and at page 41 "rested" his case, which means the same as to his testimony; and, if I understand language at all, when it is stated that both sides have given all the testimony that they desire to give, and that testimony is put down, that comprises the whole testimony in the cause; and then the record says, and *thereupon* the defendant by his counsel submitted the following propositions to the Court, and asked its judgment upon them in favor of the defendant; and then the propositions are given. And here I take leave to say, that the circuit judge took a night to consider (after having the statute and some authorities read to him) whether this form proposed by the counsel for the defendant was the proper mode of invoking his judgment upon the case so as to present it to this honorable Court; and the next day he decided that it was, and sealed the record. And the Court will find that the uniform practice, when the object is to obtain the opinion of the Court upon the law of the case, is to state all the evidence, and not a part only, and then submit particular instructions or prayers to the Court, and except to the opinion given if not approved. Greenleaf vs. Birth, 9 Peters, 292. C. and O. Canal Co. vs. Knapp, 9 Peters, 541. Buster's Ex'or. vs. Wallace, 4 Henning and Munford, 82. Farish & Co. vs. Reigle, 11 Gratt., 699. Hopkins, Bro. & Co. vs. Richardson, 9 Gratt., 486. And I respectfully submit, that as there could be no instruction asked to a jury, because there was no jury, the judge of the Court below decided correctly that there was no other mode known unto lawyers by which to obtain his opinion than that which was adopted in this case.

In conclusion, I beg leave to add, upon the question of interest, the following authorities: Penn vs. Conn, 1 Peters, Circuit Court R., page 496. Denniston vs. Imbre, 3 Wash. C. C. R., 396.

I respectfully submit that the judgment of the Court below is erroneous in omnibus.

JAMES LYONS,
of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

RICHARD COOPER, EXECUTOR OF SILAS OMOHUNDRO,

vs.

LITTLETON J. OMOHUNDRO.

Brief of Argument for the Appellee.

The defendant in error brought in the U. S. Circuit Court of Virginia an action of assumpsit against the plaintiff in error. (See Declaration and Bill of Particulars, p. 2 Record.) The general issue and a special plea of "alien enemy" pleaded. (P. 4.)

The case was tried, by stipulation, before the Judge, and he found the facts in the case for the plaintiff in the action. "See Judgment" p. 4. A Bill of Exceptions was taken by the defendant, which stretches from the 4th to the 41st page of the Record, and contains all the evidence in the case on both sides, and presents the only matter in controversy upon the record.

At the close of the testimony, the defendant, by counsel, "submitted to the Court the following propositions, and asked its judgment upon them in favour of the defendant." (See p. 41.) The Court refused to decide in conformity with them, and the defendant excepted. These propositions, predicated as they are upon the evidence in the cause, are not subjects of revision by this Court. The rule of practice is deemed to be finally and firmly settled in Drish vs. Morris, 14 Wallace, 485, "that if a jury is waived and the Court choose to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence." These propositions, as they are called, can, upon a general finding, as in this case, only be considered as prayers for instructions, and the case above cited declares that such instructions are proper only in jury trials. But if it were allowable to treat them as instructions, they are not sufficiently pointed or comprehensive, for they do not profess to cover *all* the testimony in

the case, and the Court may have found for the plaintiff, upon other evidence of an assumpsit, independent of the contract referred to in the "instruction." But, in the second place, assuming that instructions were proper in this case, and that these are instructions, which is the only use that can be made of them—do they correctly expound the law? A brief outline of the evidence is necessary to determine this question.

The plaintiff below was the son of Silas Omohundro, the testator of the defendant below. In the year 1841 Silas Omohundro carried to Cincinnati a woman and two children, of whom the plaintiff was one. He bought a house for her and supported her and her children up to the Spring of 1861 He visited her about once a year during that period and she bore him four more children. Her relation to him seems a matter of dispute in the record. The plaintiff shewed by Adam N. Riddle, who was the confidential friend and legal adviser of Silas Omohundro, that he was told by him that she was his wife, (p. 8, answer to 1st question,) and the defendant Cooper testified that she was the slave of Silas Omohundro, (p. 30.) The depositions of Brown, Riddle and Sydney Omohundro, (on pages 8, 9, 10,) shew that she received remittances of money for her support and that of her family from him, and that she incurred bills which he paid when he made his periodical visits.

In the Spring of '61, he was having built for her a new house, by Brown, one of the above witnesses, and he found difficulty in remitting all the money to him and the plaintiff was requested to furnish the same for him, which he did, and this makes the item of $491 in the Bill of Particulars.

About the same time he saw that it would be impossible to remit funds to support his family, and he requested the plaintiff to furnish it. He did so, and this constitutes the other claim in the Bill of Particulars, amounting to $3,900.

The plaintiff's right to recover for these advances is denied upon the ground that the laws of war forbid such a contract, and it was argued that after the proclamation of the President of the 27th April, 1861, declaring a blockade of the ports of Virginia, no authority could legally be given by a citizen of Virginia to a citizen of Ohio to advance money on his account, and inasmuch as the letters of Silas Omohundro to his son, the plaintiff, making request to advance money, were dated the 26th and 28th of April, 1861, his promise to re-imburse his son was void. (See the letters, pages 15, 16, 17.)

These letters contain unlimited authority to advance money. For example, in the letter of 28th April, he says: "You must all arrange

matters the best you can, as I cannot help myself; *but will foot all bills* as soon as it is in my power to do so." Again, in the letter of the 8th of May, '61, to the plaintiff's mother, he says: "You mention your money is out and you had to borrow from Littleton, (the plaintiff.) I am glad you are in as good a situation as that, as I cannot now get a check on none of the Northern cities on no terms, so *you must tell Littleton to let you have as much money as you want*, and I will pay him the same per cent. he is getting, as it is impossible for me to send you money now on any terms, although I have it; but you and Littleton both know it is impossible for me to get exchange, and you or Littleton knows of the great difficulty for me to get letters to you or you to me."

A broader authorization could hardly be given, or one less limited in duration. Springing from a necessity created by circumstances, it was to continue as long as those circumstances existed. Was it unlawful? In the first place, it is humbly submitted, a civil war differs in essentia particulars from a war "*inter gentes.*"

Commercial intercourse is forbidden from the time war between nations is proclaimed or is flagrant, and the citizens of each nation become, "*eo instanti*," enemies, and are bound at their peril to take notice of the fact of war. In a civil war, and especially in the late civil war in our own country, the character and proportions of that war are and were regulated by the side claiming to be sovereign. Hence the United States, measuring its efforts for repression by the force of the resistance, had, on the 27th of April, declared a blockade of Virginia's ports, and it is urged that from that day a citizen of Virginia could not hold commercial intercourse with a citizen of the United States, and that it is a presumption "*juris et de jure*," that he knew such was the legal effect of that proclamation. If this be so, then all contracts between citizens of Wheeling and other Western towns of the then Virginia and Cincinnati or elsewhere in the United States were void in the interval between the 27th of April and the date their restored government. It would seem that there is more reason why notice of *war* should be given in civil strife than of *peace*, and this court, in U. S. vs. Anderson, has recognized the necessity of proclamation or legislation to announce peace. See p. 70, 9th Wallace.

The blockade, with all its consequences, as asserted in the Prilze cases, 2 Black 635, in the capture of water borne commodities belonging to citizens of Virginia as enemy property, might well be in force, and "*pro tanta*," might be a condition of war as the cases decided, and yet war, with *all* its consequences on land, would not inevitably

follow in a civil strife, because it had not been so announced by the sovereign. And such was the opinion of Congress, for on the 13th of July, '61, the President was authorized to prohibit commercial intercourse, and he did so by proclamation on the 16th of August. Such action would have been superfluous, if the rules governing rational wars had operated *proprio vigore*. It is not denied that this court has decided to adopt the date of the blockade as a period at which the statute of limitations and the running of interest should stop. But this, it is humbly supposed, was done in order that a uniform rule might for general commerce be established. For it is known historically that the courts of the United States were closed in many of the States for months before the blockade was proclaimed.

But in the United States vs. Grossmeyer, 9 Wallace, 72, the Court annulled the contract as in violation of the act of Congress and say expressly that the act of Congress was passed because Congress "did not wish to leave any one ignorant of the effect of war."

Hence it may be fairly inferred that the sovereign power, with generous forbearance, did not intend to apply the non-intercourse rule until Congress acted. Such a result would be far more consonant with reason and with equity and the general policy of the government than to hold that the proclamation of blockade gave notice that war, with all its restrictions, had been thereby declared. Especially when it makes no allusion to *war* in terms, but contains a provision as to piracy, which negatives the idea of *war*. Bound as the people of these States then were, in the closest ties of interest and of business, it would be hard that in a moment these were to be ruptured, and no time allowed to staunch a vein or tie up an artery.

But if in this view there be error, was the authority conferred and duty imposed by these letters forbidden by the laws of war? As to this, it may be said that the intercourse interdicted by the act of Congress was *commercial* intercourse. And as in a civil war the sovereign power is the sole judge of the restraints to be imposed upon those it treats as rebels, this act tolerates and permits intercourse which is not commercial. In U. S. vs. Grossmeyer, above cited, the Court condemned the negotiation as commercial, and also because a messenger passed between Macon, Georgia, and New York. But in the case at bar the authority to advance money was given expressly, because locomotive intercourse was impossible. The support of the defendants family was not designed to aid the enemy, nor to injure the United

States. The act was to be performed wholly in the United States, and its effect was to provide for those who else might have been a tax upon its resources. There is nothing in public policy on the part of the United States to forbid it. It is not "*malum in se*;" on the contrary, it is commendable in a moral point of view. And if condemned, it can only be by some supposed inexorable rule of national law of unvarying and resistless application. That law, happily for mankind, is founded upon a broader basis than that upon which municipal law rests, and is interpreted by those eternal principles of right which are derived from the moral law. No precedent bars its way in the pursuit of justice. Freedom from technical trammel is one of its brightest features. And it may be safely invoked in a case like this, for which no exact parallel can be found—a case growing out of the highest obligations of duty and affection.

The letters referred to in the propositions went both by mail *via* Memphis and by Adams Express, as they show upon their face. The Government of the United States at that time tolerated both. The mails directly North had been discontinued, but it is known historically that it was not until long after that the Western mails were stopped. The same is true of the Express. But if this had not been so, such communication is not interdicted—the purpose being innocent and the object praiseworthy.

This subject has undergone a most elaborate investigation in the case of Kershaw vs. Kelsey, Massachusetts Reports, Vol. 100, p. 561, where the decisions and text writers at home and abroad have been reviewed and analyzed, and where it is held, p. 576, "In a civil war it is well settled that the sovereign has belligerent as well as sovereign rights against his rebel subjects, and may exercise either at discretion. The act of Congress and the proclamation of the President, upon which the defendant relies in this case, are in terms limited to the prohibition of commercial intercourse and the conveyance or transmission of goods and merchandize between the territories occupied by the two belligerents, and thus clearly manifest the intention of the Government in accordance with what we have seen to be the general law of nations, that commercial intercourse and commercial intercourse only should be prohibited." In the case at bar there is no pretence of commercial intercourse. A man living in Richmond requested his son living in Cincinnati, by letters written between the 26th of April and 8th of July, '61, to furnish his family with a support and that he would repay his son when the troubles then existing were over. There was no restriction as to amount and no limitation as to time, though doubtless neither party anticipated that the troubles which prevented intercourse would continue as long as they did. Money thus advanced for the reasonable and moderate support of the family—as this was proved to have been—ought to be re-imbursed, and so the Court below decided.

WM. W. CRUMP,
Counsel for defendant in error.

No 173

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES.

RICHARD COOPER, EX'R OF SILAS OMOHUNDRO,

Respectfully requests that you will grant a rehearing and permit a re-argument of the case of Cooper, ex'or, vs. Omohundro, recently decided by this Honorable Court, and he respectfully assigns the following reasons for the same; viz:

I. The ground of defence was that the written contract upon which the plaintiff relied, and without which he could not possibly recover, being made, as appeared by its face, by a citizen of Virginia, with a citizen of Ohio, in the year 1861, during a state of war between the Confederate States and the United States, was, and is void, by the laws of war and the laws of the United States.

The plaintiff exhibited the contract. The defendant offered no evidence in conflict with it, nor was there any conflicting evidence in any part of the case. Your petitioner did not deny that his testator had made the contract which the plaintiff relied upon, but your petitioner offered evidence in addition to the contract, all of which was in writing or in print, for the purpose of proving more fully the actual state of war at the time the alleged contract was made. Upon the trial of the case your petitioner, by his counsel, asked the Court to interpret the contract and to declare that it was void; and,

2nd. If not void it was an executory agreement which was terminated by war.

3rd. That it was too indefinite to be executed; and,

4th. No interest was recoverable during the war.

The record shows, at page 41, that the court ruled upon each of these propositions severally against your petitioner, and he excepted to the opinion of the court, and he is advised that this ruling and exception are to be taken as if a several judgment had been rendered upon each proposition, and several bills of exception taken, and your petitioner submits that this is not a general, but a several finding, if it be possible *in rerum naturæ* that there could be a several finding in such case.

The single question presented to the Court was whether a contract upon its face and by parol evidence, about which there was no controversy, shown to have been made in a state of actual war between alien enemies, was or was not valid, and that precise question was decided by the Court in refusing to rule as it was requested, and there is no other mode known to the law, as your petitioner is advised, by which the opinion of the Court can be obtained upon a written document where there is not a jury in a cause.

II. If there had been a jury, your petitioner is advised, the only mode of obtaining the opinion of the Court in such a case would have been to state the evidence and not the facts proved, and to have asked the Court to tell the jury what was the law upon such a contract, or without referring to the jury to decide itself that the contract upon its face and the evidence surrounding it was void in law; but no instruction could be asked in this case, because there was no body or tribunal to be instructed, and all that could be done was to present the question to the Court, and ask it to decide it, it being always the province of the Court to decide upon the construction or interpretation of written contracts, as well as upon their validity.

By the decisions, both of the Supreme Court of the United States, and the Supreme Court of Appeals of Virginia, the proper mode of proceeding in a similar case where there is a jury is to ask the Court to instruct the jury what the law upon the evidence which has been given is, and if it refuses,

to except to the opinion of the Court setting out the evidence and not the facts proved, because no facts can be assumed or certified to be proved until the case is ended, and then only upon a motion for a new trial, and the law is that when such a motion is overruled a bill of exceptions must be taken to the ruling of the Court, in which the *facts proved* must be stated, because the correctness or incorrectness of the ruling depends upon the *facts proved* and not upon the evidence offered, for although the evidence may *tend* to prove certain facts it may not do so, because of its own weakness or because it is sufficiently contradicted by other evidence. Greenleaf vs. Booth, 1 Peters, 292; C. and O. Canal Co., vs. Knapp, 4 Peters, 541; Burton, ex'r, vs. Wallace, 4 Hen. & Munf., 82; Farish & Co., vs. Reigle, 11 Gratt., 699; Hopkin's Bro. & Co., vs. Richardson, 9 Gratt. 486.

III. But in truth the *facts* have been certified because the whole testimony has been certified, and there being no conflict in it that is necessarily a certificate of the facts, for even if there was conflicting evidence offered by the defendants, the Court will disregard it and deal with the case upon the plaintiff's testimony. Gimmi vs. Cullen, 20 Gratt. 439, in which all the cases upon that point are reviewed, and the doctrine affirmed as here stated.

With all respect I submit that when this Honorable Court says in its opinion that "countervailing evidence" was introduced by the defendants, it committed an error. There was no "countervailing evidence" offered affecting, at least, the factum of the contract, but such only as was legally proper to aid the Court in expounding the contract by the light of surrounding circumstances, at the time it was made, for all the advances made to what is called "the reputed wife" of the testator, were prior to the contract with the plaintiff. But the Honorable Court does look into the evidence, and upon one view of it decides that the plaintiff has made out his case, for in the first paragraph of its opinion it assumes,

first, that "advances were made by the plaintiff for Silas Omohundro, in the sum of $4,390, as alleged in the bill of particulars filed in the case," and in the third paragraph of its opinion it comments upon the evidence offered by the plaintiff, and in the fourth paragraph it comments upon the evidence offered by the defendant, which was chiefly to shew the existence of the war and the alienage relied upon by the defendant's plea. Now I submit, with profound respect, that the Court could now assume or affirm that *any* sum of money was paid by the plaintiff, for the defendant, without reading the alleged contract and affirming its validity, for without such contract, or a contract, (and there was none other,) the Court could not, without looking into and considering the evidence, and especially the receipts given in Ohio, affirm, as it does, that receipts had been given and money paid, and looking as it does into the whole of this evidence, the Court was obliged to see and know that the contract was made during the war, by a citizen of one of the Confederate States, with a citizen of one of the States at war with the Confederate States, and that the money was paid in one of the Northern States, in pursuance of that contract, and thus judicially knowing these facts from the record, this Honorable Court had all the material necessary to enable it to decide whether the ruling of the Circuit Court was right or wrong upon the first point ruled by it. What more could it have upon that point, no matter what the form in which the question was presented to the Circuit Court. If the Circuit Court had made a special finding, what could it have found, and have been bound to find?

First, it would have been bound to find that the contract was made during the war between alien enemies, and upon that finding have pronounced the law. Now your petitioner respectfully submits that these facts could not have been more distinctly found than they have been, it being a settled rule of practice in all courts that when the Court is asked

to give an instruction upon a certain state of the evidence, the party asking the instruction admits every fact which the evidence tends to prove, and the instruction announces the legal results of the facts. Such is not only the case here, but there was no conflict in the evidence, so that for that reason also the evidence which is set out in the bill of exceptions, being not contradictory, the facts stated in it are necessarily to be taken, as proved.

Secondly. There is no mode, as your petitioner is advised, known to the profession, by which there can be any finding upon the force, effect and validity of a written document, but to exhibit the document and ask the opinion of the Court upon it, which was done here.

Thirdly. If the Court had written out its opinion in the most special form that can be imagined, what could it have done more than to say, upon this evidence, the Court is of opinion that the contract is valid or invalid, as the case may be, and has it not done that precise thing in the form resorted to?

Again, if this record is a sealed book for all purposes of the defence, I respectfully ask why it is not a sealed book for the plaintiff: and I submit, with profound respect, that when this Honorable Court tore off the seal to look into the record for the justification of the defendant, (in error,) justice to the plaintiff in error, requires that it should be looked into for all purposes? And I respectfully submit another error in its search into the evidence. It calls the colored concubine and former slave of Silas Omohundro his "reputed wife," when, by the laws of Virginia at that time, it would have been a crime to marry his slave, as it was to cohabit with her without marrying, and there is no evidence tending to show that she was his reputed wife in Ohio, except the fact that he was once heard to call her his wife, which, as your petitioner is advised, is not evidence of reputation.

IV. This Honorable Court says in its opinion that no mo-

tion was made in the Circuit Court to exclude any part of the plaintiff's evidence.

I respectfully submit that that could not be done because it was not an entirety, and some oral testimony was necessary so to apply the evidence of the plaintiff and defendant by showing the status of the parties as would bring it within the plea of the defendant, and the law applicable to the case, and in such a case, and in any case it is the more approved practice to allow the evidence to go to the jury, where there is a jury, and ask the Court to say what the law upon that evidence is, or as in this case to ask the Court to rule what it was, it being the jury, and as I have already shown all that could have been done if a jury had been sworn, was to ask the Court to tell the jury what the law was *upon the evidence*, and the Court was asked not to tell itself, (that would have been absurd,) to *declare* the law. Can more be required where the parties substitute the Court for the jury than he is bound to do, or could be required to do, if there is no substitution?

If there be any error in the form of this record, wouldn't it be more just and legal, I respectfully ask, to reverse the judgment and let the record be made up in such form as this Court shall prescribe? The error, if one has been committed, is the error of the Circuit Court, for not only was the attention of the Court expressly called to the form of making up the record, the manner of presenting the question, and the form which was prescribed by it, but no one else could commit the error but the Court; but I respectfully submit that there was no error, and that the whole case is now properly before this Court; for as I understand the law upon questions of practice, the settled practice of the courts of the State in which the cause is tried, will be regarded by the Federal courts, including this Honorable Court, so, at least, I have frequently heard the rule expounded by Chief Justices Marshall and Taney: and the Supreme Court of Virginia, in the cases of Mitchell vs.

Baratta, and Mitchell vs. Riviera, reported in 17th Grattan, p. 445, expressly decided after the most careful consideration of these cases and other cases preceding them, that where the parties refer a case to the Court instead of the jury, in compliance with the Virginia statute, Code of Virginia, p. 693, which is almost identical with that of the United States, the proper mode of certifying the case is to spread all of the evidence upon the record, and not the facts proved, as was done in this case.

And in the case of Norriss vs. Jackson, 9 Wall. 125, this Court expressly decided "that if the parties desire a review of the law involved in the case, they must ask the Court to find a special verdict which raises the legal questions, or they must present to the Court their propositions of law, and require the court rule on them."

Now I respectfully submit that that is exactly what the party did in this case, he stated the evidence, and his propositions of law upon it, and asked the Court to "rule upon them." If the Circuit Judge had quoted the language of this Honorable Court, he could not have conformed to it more exactly.

If any error has been committed by the Circuit Court, or the party, I submit, with profound respect, that it has been misled by following precisely, as the circuit judge, after a night's investigation, said it had done, the directions of this Honorable Court in the case above quoted.

If, under such circumstances, the Circuit Court has comted an error in the mode of preparing the case for this Court, the proper remedy is to reverse the judgment and send the cause back, and not to impose upon the defendant the enormous penalty which a general affirmance subjects him to, while it leaves the very grave questions of law involved in the case undecided.

But your petitioner respectfully repeats what he has heretofore said, that there is no proper medium in such a case. Either the Court can look into the record or it cannot. If

it can look into the record for the purpose of determining what was the case made by the plaintiff below, it necessarily has the power to look into the case made by the defendant, because it is in *re nota*. It is not possible to conceive of a case in which the Court can look into the record for the purpose of deciding what the plaintiff has proved, without at the same time deciding what he has not proved, which necessarily involves a consideration of the defendant's evidence, for what the plaintiff in a cause has proved, is not the judgment of the Court upon his testimony only, but its judgment upon the effect of the testimony of the plaintiff and that of the defendant combined; thus the plaintiff may offer the evidence of ten affirmative witnesses, and the defendant that of twenty negative witnesses, or the circumstances surrounding the case may destroy the affirmative testimony of the plaintiff, and the judgment of the Court in such a case is necessarily the announcement of the effect of all the testimony, circumstances included, and if the negative testimony, with or without the circumstances, overthrows the affirmative, the Court is bound not only by every rule of law and logic to decide for the defendant, but it is absolutely inevitable that it should. Your petitioner submits, therefore, that his case has been made out, and falls within the prescriptions of this Court, in the case of Norriss & Jackson, 9 Wallace, and the decisions of the Supreme Court of Virginia already referred to; but if there be a doubt, he submits that the benefit of that doubt be given to justice, and that it is contrary to all the maxims and practice of law to permit the party holding the affirmative to recover, because his case is in doubt, and that especially upon a point of practice and form; and yet more especially when the Court does not adhere to its own point of practice and form.

JAMES LYONS,
Counsel for the petitioner.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 670.

JONATHAN CREWS, PLAINTIFF IN ERROR,

vs.

ISAAC N. BREWER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 6, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 670.

JONATHAN CREWS, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. David Davis, one of the associate justices of the Supreme Court of the United States, presiding judge, and the Hon. Samuel H. Treat, district judge of said district, on Friday, the fourth day of July, in the June term of said court, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

J. A. JONES, *Clerk.*

JOHNATHAN CREWS }
v. } In ejectment.
ISAAC N. BREWER. }

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Johnathan Crews, a citizen of the State of Indiana, plaintiff, puts in his place John Hallum, esq., and Messrs. Prescott, Scholes, and Mather, his attorney, against Isaac N. Brewer, a citizen and resident of
2 the said southern district of Illinois, defendant, who puts in his place G. Koerner, esq., his attorney, in a plea of trespass and ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, heretofore, to wit, on the sixteenth day of September, in the year of our Lord one thousand eight hundred and seventy-two, came said plaintiff, by his attorneys, and filed in the office of the clerk of the circuit court of said district, his declaration in ejectment against the said defendant, together with a bond for costs in said entitled cause, which said bond for costs and declaration are in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Circuit court, January term, A. D. 1873.

JOHNATHAN CREWS }
v. }
ISAAC N. BREWER. }

I do hereby enter myself security for costs in this cause, and
3 acknowledge myself bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 16th day of Sept., 1872.

SAM'L D. SCHOLES.

(Indorsed:) Filed Sept. 16, A. D. 1872. J. A. Jones, clerk,

REC. 670—1

Declaration.

In the circuit court of the United States for the southern district of Illinois.

JOHNATHAN CREWS, PL'T'F,
vs.
ISAAC N. BREWER, D'F'T. } Ejectment. To January term, A. D. 1873.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Johnathan Crews, a citizen of the United States, and of the State of Indiana, now residing in said State, the plaintiff in this suit, by attorney, complains of Isaac N. Brewer, the defendant herein, who is a citizen of the United States, and of the State of Illinois,
4 now residing in said State, to wit, at the southern district aforesaid, of a plea wherefore he, the said defendant, with force and arms, broke and entered the plaintiff's close and ejected him therefrom. For that, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and sixty-seven, (1867,) the said plaintiff was seized and possessed in fee of certain premises, situated in St. Clair County, in the State of Illinois, to wit, in the southern district thereof as aforesaid, known, designated, and described as follows, to wit: All of certain tract or parcel of land comprised in and known as United States survey, number forty-four, (44,) containing one hundred and eighteen acres and twenty-five poles, more or less, as per plat and survey of the same now of record in the office of the custodian of United States plats and surveys, at Springfield, Illinois, and a further description of which is of record in Washington City, vol. 12, page 258 of patent records, bounded and described as follows, to wit: Beginning at a post at the foot of the hills, upper corner to Nicholas Jarrot's survey,
5 No. 43, from which an ash, 26 inches in diameter, bears N. 72° E. 99 links, and a red-oak. 14 inches in diameter, bears N. 87° W. 127; thence with the foot of the hills S. 73° E. 26 poles to a stone, under which put blacksmith's cinders; thence N. 51° W. 1,105 poles to a stone in the village line, from which a honey-locust, 10 inches in diameter, bears S. 84½ E. 50 links; thence S. 50° W., 18 poles to a post, from which a honey-locust, 15 inches in diameter, bears S. 26 W. 32 links, it being upper corner to N. Jarrot's survey, No 43; thence with his upper line S. 51° 10 W. 1,068 poles to the beginning; and, being so possessed, the said defendant, afterwards, to wit, on the first day of March, in the year of our Lord one thousand eight hundred and sixty-seven, entered into the said premises and ejected the said plaintiff therefrom, and the said defendant still unlawfully withholds from the plaintiff the possession thereof. And the plaintiff avers that he claims title to the said land in fee. Plaintiff avers that the said land and premises are worth five thousand dollars. Wherefore said plaintiff says that he is injured
6 and hath sustained damage in the sum of one thousand dollars; therefore he sues.

JOHN HALLUM,
Attorney for plaintiff.

(Indorsed:) Filed Sept. 16th, A. D. 1872. J. A. Jones, cl'k.

And afterwards, to wit, on said sixteenth day of September, of the year aforesaid, a summons was issued in said entitled cause out of the office of the said circuit, clerk, directed and delivered to the marshal

of said district to execute, which said summons is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss:

The United States of America, to the marshal of the southern district of Illinois, greeting:

We command you that you summon Isaac N. Brewer, if to be found in your district, to be and appear before our judges of our circuit
7 court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield in the district aforesaid, on the first Monday of January, A. D. 1873, to answer unto Johnathan Crews of a plea of trespass and ejectment, wherein the said plaintiff sues to recover of the said defendant that parcel of land situated in the county of St. Clair, and State of Illinois, in the said southern district of Illinois, which is described as follows, to wit: All of that certain tract or parcel of land comprised in and known as United States survey number forty-four, (44,) containing one hundred and eighteen acres, and twenty-five poles, more or less, as per plat and survey of the same now of record in the office of the custodian of United States plats and surveys at Springfield, Illinois, and a further description of which is of record in Washington City, vol. 12, page 258 of patent records, bounded and described as follows, to wit: Beginning at a post at the foot of the hills, upper corner to Nicholas Jarrot's survey, No. 43, from which an ash, 26 inches in diameter, bears N. 72°
8 E. 99 links, and a red-oak, 14 inches in diameter, bears N. 87° W. 127 links; thence with the foot of the hills S. 73° E. 26 poles to a stone, under which put blacksmith's cinders; thence N. 51° W. 1,105 poles to a stone in the village line, from which a honey-locust, 10 inches in diameter, bears S. 84½ E., 50 links; thence S. 50° W. 18 poles to a post, from which a honey-locust, 15 inches in diameter, bears S. 26 W. 32 links, it being upper corner to N. Jarrot's survey, No. 43; thence with his upper line S. 51° 10 W. 1,068 poles to the beginning (which said premises exceed in value the sum of five hundred dollars) and in which action the said plaintiff claims title to said premises in fee simple, as well as the sum of one thousand dollars for his damage as he alleges by reason of unlawfully withholding the possession of said premises since March 1st, A. D. 1867, by the defendant; and have you then and there this writ, and make return thereon in what manner you execute the same.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid,
9 the sixteenth day of September, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh year.

[L. S.] J. A. JONES, *Clerk.*

Which said summons was afterwards, to wit, on the sixth day of January, in the year of our Lord one thousand eight hundred and seventy-three, returned by the marshal of said district, indorsed in the words and figures following, to wit:

I hereby appoint W. H. Bennett my special deputy to execute this writ.

Sep. 16, 1872.

E. R. ROE,
United States Marshal for the Southern District of Illinois.

I have this 18th day of November, A. D. 1872, served the within summons, by leaving a true copy of the same at the usual place of abode of the within named I. N. Brewer, with Susan McMahan, who is of the age of more than ten years, and a member of the family of said I. N. Brewer, who is in the possession of the within described premises.

E. R. ROE,
United States Marshal for the Southern District of Illinois.
By W. H. BENNETT,
Special Deputy.

(Indorsed:) Filed January 6th, A. D. 1873. J. A. Jones, clerk.

10 Then afterwards, to wit, on the eighth day of January, in the January term of said court, in the year last aforesaid, the following proceedings were had in said court, in said cause, and entered of record, to wit:

Rule to plead.

JOHNATHAN CREWS
v.
ISAAC N. BRE WER. } In ejectment.

On motion of plaintiff, by John Hallum, esq., his attorney, the defendant having been regularly served with process is ruled to plead herein in twenty days.

Now, afterwards, to wit, on the twenty-second day of said January of the year last aforesaid, came said defendant, by his said attorney, and filed in the clerk's office of said court his plea herein; which said plea is in the words and figures following, to wit:

Plea.

In the circuit court of the United States, southern district of Illinois.

JONATHAN CREWS
vs.
ISAAC N. BREWER. } Ejectment.

11 And now comes the said defendant and defends the wrong and injury, when, &c., and says that he is not guilty of unlawfully withholding the premises claimed by said plaintiff in manner and form as alleged in his said declaration; and of this he puts himself upon the country.

G. KOERNER,
For Defendant.

And the plaintiff does the like.

HALLUM, SCHOLES & MATHER,
Att'ys for Pl'ff.

(Indorsed:) Filed January 22, 1873. J. A. Jones, cl'k.

Afterwards, to wit, on the twenty-third day of said January in the term and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order of continuance.

JOHNATHAN CREWS } v. ISAAC N. BREWER. } In ejectment.

On motion of plaintiff, by John Hallum, esq., his attorney, this cause is continued.

12 And afterwards, to wit, on the twenty-seventh day of said June, in the June term of said court of the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Trial by court.

JOHNATHAN CREWS } v. ISAAC N. BREWER. } In ejectment.

This day comes as well the plaintiff by John Hallum, esq., his attorney, as the defendant, by G. Koerner, esq., his attorney, and the issue joined by consent is tried by the court, a jury being waived, and the court having heard the evidence and argument of counsel, and not being sufficiently advised in the premises takes time to consider.

Then afterwards, to wit, on the fourth day of July, in the term and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit.

13 *Judgment.*

JOHNATHAN CREWS } v. ISAAC N. BREWER. } In ejectment.

This day come again the parties, by their attorneys, and the court, being sufficiently advised in the premises, finds the issue for the defendant, that he is not guilty of unlawfully withholding from the plaintiff the possession of the real estate and premises in the plaintiff's declaration described or of the trespasses in ejectment therein mentioned.

Whereupon, the plaintiff enters his motion for a new trial herein, which, being heard by the court, is overruled.

It is therefore ordered and adjudged by the court that the plaintiff take nothing for his writ; that the defendant go hence without day and recover of the said plaintiff the sum of nineteen dollars and twenty cents, his costs and charges by him about his defence in this behalf expended and that he have execution therefor.

On motion of plaintiff leave is granted to file bill of exception, in sixty days.

14 Now, afterwards, to wit, on the twenty-fifth day of August, of the year last aforesaid came again said plaintiff, by his attorneys, and filed in the office of the clerk of the circuit court of said district his bill of exceptions herein; which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States, southern district of Illinois, ss: June term, A. D. 1873.

JOHNATHAN CREWS
vs.
ISAAC N. BREWER. } Bill of exceptions.

Be it remembered that this cause came on to be heard before the Hon. David Davis, presiding judge, at the June term, 1873, of said circuit court, and that plaintiff and defendant by written stipulation waived a trial by jury and submitted the case to the court, upon proof and argument, on the 27th day of June, 1873. Whereupon the plaintiff to maintain the issue upon his part read in evidence a patent dated the 23d day of March, 1866, from the United States, for the land de-
15 scribed in plaintiff's declaration, to Francois Trottier; which patent is in the words and figures following, to wit:

Patent from United States to Francois Trottier.

Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting:

Know ye that a duplicate certificate having been deposited in the General Land-Office, numbered four hundred and forty-four of the register of the land-office at Springfield, Illinois, whereby it appears that, pursuant to an act of Congress, approved on the first day of May, one thousand eight hundred and ten, entitled "An act concerning the decisions of the commissioner, in favor of the claimants of land in the district of Kaskaskia," Francois Trottier is confirmed in his claim or ancient grant numbered one hundred and ninety-five, survey number forty-four, as entered in the transcript of decisions bearing date December thirty-first, one thousand eight hundred and nine, transmitted to the Secretary of the Treasury by the commissioner, appointed under the act of March twenty-sixth, one thousand eight hundred and
16 four, containing one hundred and eighteen and twenty-five one hundred & sixtieths acres, being one and a half arpents front, extending from the hills to the regatel, adjoining west Nicholas Jarrot; east, Louis Pettier, as per plat of the common-field lands of the village of Cahokia contained in a certified record of confirmed claims in the district of Kaskaskia, transmitted to that office by the Commissioner of the General Land-Office, dated twenty-eighth of July, one thousand eight hundred and fourteen, claimed by and affirmed to Francois Trotier, in right of La Chance, alias Joseph Pepin, who was assignee of Pierre Dubois, by the said commissioners' report, and confirmed by act of Congress approved February twentieth, one thousand eight hundred and twelve.

There is, therefore, granted by the United States unto the said Francois Trottier the tract of land above described; to have, and to hold the

said tract with the appurtenances unto the said Francois Trottier, and unto his heirs and assigns, forever.

In testimony whereof I have caused these letters to be made patent and the seal of the General Land-Office to be hereunto affixed.

17 Given under my hand at the city of Washington, the twenty-third day of March in the year of our Lord one thousand eight hundred and sixty-six, and of the Independence of the United States of America, the ninetieth.

By the President:

[L. S.] ANDREW JOHNSON,
By EDW. D. NEIL, *Secretary.*

I. N. GRANGER,
Recorder of the General Land-Office.

STATE OF ILLINOIS,
St. Clair County, ss:

This instrument was filed for record this, the 11th day of September, A. D. 1872, and is duly recorded in book R 5, page 2.

GEO. M. ROEDER,
Recorder.

Plaintiff next read in evidence an original deed from Nicholas Trottier, one of the heirs at law of Francois Trottier, to Johnathan Crews, the plaintiff, dated and properly acknowledged and certified on the 12th day of January, 1866, conveying to the plaintiff all of the vendor's interest in the land in question in fee, with special warrantee. The

18 deed is not herein inserted because it was admitted without exception, and not material to the issue presented in this record.

Plaintiff next read in evidence an original deed from Napoleon Trottier, Joseph Trottier, Antoine Trottier, Jane Trottier, Henry Drain, Margery Drain, Mary A. Brommet, Gabriel Trottier, Theressa Trottier, Peter Trottier, Martha A. Trottier, Nicholas Trottier, Mary A. Trottier. Oliver Trottier, and Philomene Trottier, descendants and heirs at law of Francois Trottier, dated, acknowledged, and properly certified, on the 28th day of July, 1866, conveying to the plaintiff in fee, by special warrantee, all of their interest in the land in question. The deed is not herein inserted, because admitted without exception, and not material to the question on issue presented in this record.

Plaintiff next read in evidence an original deed from Joseph Trottier, one of the heirs at law of Francois Trottier, dated, and properly acknowledged and certified on the 25th day of December, 1866, conveying in fee to plaintiff, with special warrantee, all of the vendor's interest in the land in question. The deed is not here inserted, because ad-

19 mitted without exception and not material to the issue presented in this record.

Plaintiff next read in evidence a certified copy of the United States field-notes, plat, and survey of the land in question, which is in the words and figures following, to wit:

20 Surveyed for Francois Trotier, who claims in of Lechance alias Joseph Pekin, who was assignee of Pierre Dubois, 118 acres & 25 poles of land: Beginning at a post at the foot of the hills, upper corner to Nicholas Jarrot's survey, No. 43, from which an ash, 26 in. in dia., bears N. 72° E. 99 links, and a red-oak, 14 in. in dia., b'rs N. 87° W. 127 l'ks; thence with the foot of the hills S. 73° E. 26 poles to a stone, under which put blacksmith's cinders; thence N. 51° W. 1,105 poles to a stone in village line, from which a honey-locust, 10 in. dia., bears S. 84½ E. 50 links; thence S. 50° W. 18 poles to a post, from which a honey-locust, 15 in. in dia., bears S. 26 W. 32 l'ks, it being upper corner to N. Jarrot's survey, No. 43; thence with his upper line S. 51° 10 W. 1,068 poles, to the beginning.

(Signed) W'M RECTOR, *V. S.*

JULY 6TH, 1808.

STATE OF ILLINOIS,
Office of Custodian of the U. S. Surveys:
SPRINGFIELD, *May 13th*, 1872.

I certify the above is a true copy of the plat of part of T's 21 Nos. 1 & 1 N., ranges No. 9 & 10 west 3rd p. m., & a correct copy of the field-notes of the survey of survey No. 44, on file in this office.

W. W. H. LAWTON,
Custodian U. S. Surveys.

Plaintiff then read in evidence a certified record from the county court of St. Clair County, Illinois, showing the appointment and qualification of Felicite Trottier, widow of Francois Trottier, as administratrix of the estate of Francois Trottier, in March, 1804, and an order of said court to sell two tracts of land belonging to the estate of Francois Trottier, situated in the common fields of Cahokia—one tract of and arpent in front, and one tract of two arpents in front, extending from Cahokia Creek to the hills; but it did not appear from said record that said order of sale had ever been complied with. Said order was made at the March term, 1805, of said court, and the administratrix at the same time surrendered the administration.

The said record is not here inserted because admitted without exception, and not material to the issues presented in this record.

Plaintiff next read in evidence the depositions of Frank Sou- 22 drett, Felicite Souligny, and Eber Soudrett, children of Felicite Soudret by her second husband, who was the widow of Francois Trottier, claimed by plaintiff, (the confirmee,) proving that plaintiff's vendors are the sole heirs at law of said Francois Trottier; that Francois Trottier died in 1803, in Cahokia, St. Clair County, Illinois; that he heard Felicite say that Francois Trottier, her husband, owned land there, administered on the estate of her husband, the said Francois Trottier; that she removed with her four children by her first husband from Cahokia, in St. Clair County, Illinois, to Vincennes, Indiana, in the fall of 1805, where she remained until her death, in 1849; that their mother, the said Felicite, married Francois Trottier in Vincennes, Indiana, in January, 1792, and removed immediately thereafter to Cahokia, Ill., where she lived until the fall of 1805.

These depositions are not herein inserted in full because admitted without exception, and not material to the issues presented in this record.

Plaintiff next read in evidence a sworn copy of the record of
23 the marriage of Felicite Cardinal and Francois Trottier, taken from St. Xavier's Catholic church at Vincennes, Indiana, showing the marriage of the said parties, annexed to the deposition of Rev. P. Tully Doyle, officiating priest in charge of said records, proving said marriage to have been solemnized on the 2nd day of January, 1792.

The said record and deposition are not herein inserted in full because admitted without exception, and not material to the issues presented in this record.

Plaintiff then read in evidence the act of Congress, approved the 26th of April, 1816, authorizing patents to issue for confirmed land-claims in the district of Kaskaskia. Defendant then admitted that the land in controversy is worth more than two thousand dollars.

This was all the testimony introduced by the plaintiff.

Testimony of Julia Jarrot.

The defendant, to maintain the issue on his part, then read in evidence, subject to exception, the deposition of Mrs. Julia Jarrot, who testified that she is 93 years old; that she knew one Francois
24 Trottier in 1815, who sold the land in question to her husband, Nicholas Jarrot. It was one or two acres in width. This was all the land that he had there. He was about 25 years old when he sold to my husband. I understood that he inherited the land from his father. We have had possession of the land since my husband purchased it until the present time. Defendant Brewer is our tenant; do not know the name of vendor's father and mother. They were both dead before I moved to Cahokia, in 1789. I never knew any other Francois Trottier. The man from whom my husband bought died in French village. I knew a man by the name of Joseph Trottier; don't know whether my husband ever bought any land from him or not. He was a cousin to the Francois Trottier from whom my husband bought.

Additional testimony of Julia Jarrot.

TESTIMONY OF MRS. JARROT.

Is 93 years of age; is widow of Nicholas Jarrot; came to Cahokia 1798; lived in Cahokia since that time, with few exceptions.
25 Knew Francois Trottier; was an old neighbor; recollect when my husband bought land from him; was one or two acres in width. It was the land in question; was all the land he had there; recollects indistinctly that Trottier lived in the house after he sold it. He lived there when he sold it; understood inherited it from his father. From the time my husband bought we had possession of it, & and kept it, and have it now; do not remember when Trottier died. When Trottier sold the land to my husband he was about 25 years of age; does not remember the name of his father. His father and mother were dead; never knew of any other Francois Trottier. The one from whom my husband bought died at French village; presume his father and mother died at Cahokia, because at that time there was no settlement outside of Cahokia; don't know when this Francois Trottier died; does not know of any other Francois Trottier in Cakokia; does not remember a Felicite Trottier. The one I knew was twice married; married his second wife, a widow in Cahokia; remember it from the fact
26 that a little daughter of the widow called at my house at the time;

the name of his first wife was Alice, she thinks; does not know whether he had any other land in or near Cahokia; knew a man by the name of Jos. Trottier; was called Martin; thinks was a cousin to Francois; does not know whether her husband bought land from him. She knew a family by the name of Sancon Trottier, who came from Vincennes; does not know that the woman of that family came to Cahokia as a widow or not; recollects the woman; don't recollect having seen the man; did not stay long, but went back. She had some children; never heard he owned any lands at Cahokia.

Plaintiff admitted that the estate of Nicholas Jarrot had been in possession of the land in controversy for twenty years, and that those representing the estate had paid all taxes legally assessed on the same for more than 20 years.

Testimony of Vital Jarrot.

Defendant next introduced Vital Jarrot, who testified that the family had been in possession of the land since 1817, and that they have
27 paid all the taxes on the same; he knew the Francois Trottier who sold the land in question to his father well. He was not of the Vincennes family of Trottiers; did not know the name of vendor's father; never knew him; did not recollect Joseph Trottier.

Additional testimony of Vital Jarrot.

The Vincennes Trottier went by the name of Sancon. Francois Trottier, who sold the land to my father, went by the name of Lala; recollects Francois Trottier well; lived on the land; he sold to father the lands about which an order was made by the county court; were a one arpent tract and a two arpent tract; the land in question is a one and one-half arpent tract. The land described in the deed from Francois and Jos. Tottier to Nicholas Jarrot, is the land in question. Witness is 68 years of age.

Defendant next introduced and read in evidence a deed from Francois andJoseph Trottier to Nicholas Jarrot; which deed is in the words and figures, following, to wit:

28 *Copy of deed.—Trotier et al. to N. Jarrot.*

This indenture, made the fifth day of January, in the year of our Lord one thousand eight hundred and fifteen, between Francois Trotier and Joseph Trotier, of Cahokia, in the county of St. Clair, in the Illinois Territory, yeoman, of the first part, and Nicolas Jarrot, of the county and Territory aforesaid, of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of one hundred dollars current money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged hath and by these presents doth grant, bargain, sell, release, and confirm unto the said party of the second part, and to his heirs, and assigns forever, all that certain tract or quantity of land, being, lying, and situate in the Cahokia common of one arpent and a half in breadth, and in the depth to the hills joining westwardly to lands of the grantee, and eastwardly to lands of the heirs of Jean Bapt. Dubuques, and to the north end abucting or joining
29 the said Jarrot's brick-house lot: To have and to hold the above described and granted premises, with all and singular the rights,

privileges, and appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, claim or demand, whatsoever of them, the said party of the first part, either in law or in equity of, in, and to the above bargained premises, and every part or parcel thereof to the said party of the second part, his heirs and assigns, to the sole and only use, benefit, and behoof of the said party of the second part, his heirs, and assigns, forever. And furthermore the said party of the first part doth, by these presents, bind themselves forever to warrant and defend the above granted and bargained premises to him, the said party of the second part, his heirs, and assigns against all claims and demands, whatsoever.

In testimony whereof the said party grantors have hereunto set their hand and seals the day and year first herein above written.

mark of + FRANCOIS TROTIER. [SEAL.]
mark of + JOSEPH TROTIER. [SEAL.]

30 Signed, sealed & delivered in presence of—
JOHN HAY.
RAPHAEL WIDEN.

Then received on the day of the date of the within deed and of and from the within-mentioned Nicolas Jarrot, the sum of one hundred dollars currency of the United States, being the consideration mentioned in the said deed.

mark of + FR'S TROTIER.
mark of + JOSEPH TROTIER.

Witnesses:
JOHN HAY.
RAPHAEL WIDEN.

ILLINOIS TERRITORY,
St Clair County, sct:

Be it remembered that, on the fifth day of January, 1815, personally came before me the subscriber, a justice of the peace of the said county, the within-named Francois Trotier, and Joseph Trotier, the party grantors within mentioned, and acknowledged the aforegoing instrument of writing to be their voluntary act and deed, and the premises therein mentioned, and thereby bargained and sold, to be the
31 right and estate of the within-named Nicolas Jarrot, party grantee, also therein named, his heirs and assigns forever, according to the purport, true intent, and meaning of the said deed and the statute of the Territory in such case made and provided.

Acknowledged before and certified by—

JOHN HAY, *J. P.* [SEAL.]

Recorded the seventh of January, one thousand eight hundred and fifteen.

JOHN HAY, *Recorder.*

STATE OF ILLINOIS,
St. Clair County, ss:

I, Charles Becker, clerk of the circuit court and ex-officio recorder, in and for said county of St. Clair and State of Illinois, do certify the fore-

going to be a true and correct copy of a deed from Francois Trotier and Joseph Trotier, to Nicolas Jarrot, as the same appears of record in my office, in Book C, page 90 of said St. Clair County records.

In testimony whereof I hereunto set my hand and affix the seal of said court at office in Belleville, Illinois, this seventeenth day of
32 June, A. D. 1873.

[L. S.] CHARLES BECKER, *Clerk.*

This was all the evidence introduced by defendants.

Instructions asked by plaintiff.

Plaintiff then asked the court to declare that he had the superior legal title to the land in question from the United States; that the confirmatory act of Congress approved on the 1st of May, 1810, entitled "An act confirming the decisions of the commissioners in favor of the claimants of land in the district of Kaskaskia," did not and could not convey the fee to the confirmee, because at the date of the confirmatory act the confirmee was dead. That there was no person in esse to take the land at the date of confirmation. That the act of confirmation only vested the heirs and representatives of the confirmee with an equity—and that the fee to the land in question did not pass to them until the issue of the patent by the United States for the land in question, and that the statute of limitations prescribed by the State of Illinois,
33 is no defence to plaintiff's action.

But the court refused so to construe the said act of Congress or to hold that the limitation laws of Illinois did not bar plaintiff's action.

The court held as matter of law under the foregoing facts—

1st. That the act of Congress, approved May the 1st, 1810, passed the title of the United States, which enured to the benefit of the heirs and assignees of the confirmee, notwithstanding he was dead before the passage of the confirmatory act.

2nd. That the patent was not of itself the grant of the land by the United States, but only the evidence that a grant had been made to Francois Trottier, the confirmee.

3rd. That as Jarrot went into possession of the land under claim and color of title made in good faith, and had paid all the taxes legally assessed thereon for more than seven successive years before the commencement of this suit that it was a bar to plaintiff's action.

4th. That if, according to plaintiff's view, the confirmatory act did
34 not pass the title to the lands in question, because the confirmee was dead, the same rule would apply to the patent issued in 1866.

The court further held as a matter of law that, at the entrance of defendant the lands in the Cahokia common field, having been possessed by French inhabitants under grants or supposed grants from the Government of France from 1726, and before confirmation by Congress, and the rights and possessions of the French settlers having been guaranteed by the treaty of 1763, between France and Great Britain and by the treaty of 1783 between Great Britain and the United States, and also by the cession of the State of Virginia to the United States of 1787, were subject to the jurisdiction of the United States, but formed no part of the national dominion in a proprietary point of view. That the appointment of commissioners in 1804 to ascertain the claims of parties, and the subsequent surveys made by the United States reported by the said commissioners, had in view to separate and segregate those ancient

grants or possessions from the lands of the public domain, and that the confirmatory laws made in 1810 and 1812 are in the nature of a release and are an estoppel to the United States as to any subsequent
35 claim of a proprietary right in said lands, and that patents subsequently issued are merely evidence of such a release. That, as a matter of fact and history the said lands ever since said confirmatory acts have become and been made taxable by the respective States wherein such claims have been found to exist, and that in the State of Illinois a mere certificate of confirmation, without patent has been made evidence of title to sustain an action of ejectment by express statute. That the State laws as to limitation of actions are effective as to such confirmations from the time of the confirmatory acts.

To each and all of which propositions of law the plaintiff then and there excepted.

The plaintiff then made a motion for a new trial after the finding by the court in the issue, which motion the court overruled; to which decision of the court and the overruling of the motion, plaintiff then and there excepted and tendered this his bill of exceptions, and prayed that the same might be signed, sealed, and made part of the record.

Exceptions allowed.

DAVID DAVIS. [SEAL.]

(Indorsed:) Filed August 25th, A. D. 1873. J. A. Jones, cl'k.

Afterwards, to wit, on said twenty-fifth day of August, of the year last aforesaid came again said plaintiff and filed in the clerk's
36 office of said court his bond herein; which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

JOHNATHAN CREWS
v.
ISAAC N. BREWER. } In ejectment.

Know all men by these presents that we, Jonathan Crews, as principal and S. D. Scholes are surety, are held and firmly bound unto Isaac N. Brewer, in the sum of five hundred dollars, to be paid to the said Isaac N. Brewer, his executors or administrators; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this twenty-fifth day of August, A. D. 1873.

Whereas the above named Johnathan Crews hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause, by the circuit court of the United States for the southern district of Illinois:

37 Now, therefore, the condition of this obligation is such, that if the above-named Johnathan Crews shall prosecute his said writ of error to effect, and answer all damages and costs, if he shall fail to

make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JONATHAN CREWS. [SEAL.]
SAMUEL D. SCHOLES. [SEAL.]

Sealed and delivered in presence of—
AQUILLA P. WOODALL,
J. M. BOYLE.

Approved.

S. H. TREAT, *Dist. Judge.*

(Indorsed:) Filed August 25, A. D. 1873. J. A. Jones, cl'k.

Whereupon a writ of error issued in said cause, which said writ of error is in the words and figures following, to wit:

38 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment, in a plea which is in the said circuit court, before you or some of you, between Johnathan Crews, plaintiff, and Isaac N. Brewer, defendant, a manifest error hath happened to the great damage of the said Johnathan Crews, as by his complaint appears: We, being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same
39 at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Nathan Clifford, Senior Associate Justice of the Supreme Court of the United States, this twenty-fifth day of August in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

[SEAL.]

J. A. JONES,
Clerk of the Circuit Court of the United States for Southern District Illinois.

40 UNITED STATES OF AMERICA, *ss:*

To ISAAC N. BREWER, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein Johnathan Crews is plaintiff and you are defendant in

error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit court of the United States for said district, this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

S. H. TREAT.

(Indorsed:)

I hereby appoint W. H. Bennett, my special deputy to execute this writ, Sep. 17, '73.

E. R. ROE, *U. S. Marshal.*

Served copy of the within citation on Gustavus A. Koerner, attorney for the defendant in the above style'cause, this the 7th day of October, A. D. 1872.

E. R. ROE, *U. S. Marshal.*
By W'M H. BENNETT,
Special Deputy Marshal.

Service, 2; copy, 20—$2.20; mileage, 125, 7.50—$9.70.

41 *Certificate.*

Circuit court of the United States, southern district of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States, in and for the said southern district of Illinois, do hereby certify the foregoing is a true and complete copy of all the papers filed, proceedings thereon had, and process issued in a certain cause wherein Johnathan Crews is plaintiff, and Isaac N. Brewer is defendant, as truly and completely as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court at Springfield, in said district this twenty-first day of October in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

[SEAL.] J. A. JONES, *C'lk.*

(Indorsement on cover:) No. 670. Jonathan Crews, plaintiff in error, vs. Isaac N. Brewer. N. Illinois C. C. U. S. Filed 6th December, 1873.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

No. .....

JOHNATHAN CREWS, Plaintiff in Error,
vs.
ISAAC N. BREWER, Defendant in Error.
} EJECTMENT.

On Writ of Error to the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT OF THE CASE AND BRIEF,

BY JOHN HALLUM,

Counsel for Plaintiff in Error.

SHEFFIELD & STONE, BOOK AND JOB PRINTERS, 413 OLIVE STREET.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

JOHNATHAN CREWS, Plaintiff in Error,
vs.
ISAAC N. BREWER, Defendant in Error.
} EJECTMENT.

On Writ of Error to the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT OF THE CASE AND BRIEF,

BY JOHN HALLUM,

Counsel for Plaintiff in Error.

Plaintiff in error, who was also plaintiff in the Court below, derives title to the land in question,—

1st. From the report of the Commissioners for the District of Kaskaskia, dated the 31st of December, 1809, which report is in the words following:

[EXTRACT.]

No. of Survey.	No. of Claim.	No. of Arpents	Original Claimant	Present Claimant	Description.
44	1095	1¼	Pierre Dubois.	Francois Trottier.	From the hills to the rigolet, adjoining; West, Nicholas Jarrot; East, Louis Peltier.

[See American State Papers, vol. 2, p. 196, Duff Green edition.]

2d. Under an act of Congress, approved on the 1st day of May, 1810, entitled "*An act confirming the decisions of the Commissioners in favor of the claimants of land in the District of Kaskaskia,*" which act is in the words following, to-wit: "That all the decisions made by the Commissioners, appointed for the purpose of examining the claims of persons claiming lands in the district of Kaskaskia, in favor of such claimants, as entered in the transcript of decisions, bearing date the thirty-first day of December, eighteen hundred and nine, which have been transmitted by the said Commissioners to the Secretary of the Treasury, according to law, be, and the same are hereby confirmed."

[See Statutes at Large, vol. 2, p. 607.]

This confirmatory statute is, in so far as it respects this claim, re-enacted in the 3d section of an act of Congress, approved on the 20th day of February, 1812, entitled "*An act for the revision of former confirmations, and for confirming certain claims to land in the district of Kaskaskia.*"

[See Statutes at Large, vol. 2, p. 677.]

3d. Under the 7th section of an act of Congress, approved on the 27th day of April, 1816, entitled "*An act making further provision for settling claims to land in the Territory of Illinois,*" which is in the words following: "That every person, and the legal representative of every person, whose claim to a tract of land, within the Illinois Territory, is confirmed by this or any former act, and who has not previously obtained a patent for the same from the Governor, either of the Territory north-west of the Ohio, or of the Indiana Territory, shall, whenever his claim shall have been located and surveyed, be entitled to receive from the Register of the Land Office, at Kaskaskia, a certificate, stating that the claimant is entitled to receive a patent for such tract of land by virtue of this act, for which certificate the Register shall receive one dollar, and which certificate shall entitle the party to a patent for the said tract, which shall issue in like manner as is provided by law for lands purchased of the United States."

[See United States Statutes at Large, vol. 3, p. 307.]

4th. Under an Act of Congress, approved on the 20th of May 1836, entitled "*An Act to give effect to patents for public lands, issued in the name of deceased persons,*" which Act is in the words following: "That in all cases, where patents for public lands have been, or may hereafter be issued, in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to, and become vested in the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during life; and the provisions of this Act shall be construed to extend to patents for lands within the Virginia Military District, in the State of Ohio."

[See U. S. Statutes at Large, vol. 5, p. 31.]

The evidence in the record shows that Francois Trottier, the confirmee and patentee, died in 1803.

5th. By a patent for the land in question, issued by the United States to Francois Trottier, his heirs or assignees, dated the 23d day of March, 1866.

6th. By special warrantee deeds from all the heirs at law of Francois Trottier, in 1866, to the plaintiff in error.

Defendant in error, or his landlord, claims title to the land in question, as follows:

By deed, from one Francois Trottier, and one Joseph Trottier, dated the 5th day of January, 1815, to Nicholas Jarrot, conveying to him the land in question, and by virtue of the limitation laws of Illinois.

There is no question of identity in this record, the finding of the Court being for plaintiff on this question.

The parties, by written stipulation, waived a trial by jury, and the case was tried by the Court, who found for defendant.

ASSIGNMENT OF ERRORS.

Now comes the said Johnathan Crews, plaintiff in error, and says that in the record and proceedings in the above entitled cause, there is manifest error, and for error assigns the following, to-wit:

1st. The Court erred in holding that the plaintiff did not have the superior legal title from the United States.

2d. The Court erred in holding that the patent did not convey title to the land in question.

3d. The Court erred in holding that the limitation laws of Illinois barred plaintiff's claim.

4th. The Court erred in holding that the fee to the land in question was never vested in the United States.

5th. The Court erred in holding that the Confirmatory Acts of 1810 and 1812, operate as an estoppel to the United States, preventing them from conveying the fee by patent.

JOHN HALLUM,
Att'y for Plaintiff in Error.

BRIEF AND ARGUMENT.

We give the decision and reasons therefor by the Court in full as embodied in the bill of exceptions.

"Plaintiff then asked the Court to declare that he had the superior legal title to the land in question, from the United States; that the confirmatory act of Congress approved on the first of May, 1810, entitled, '*An act confirming the decision of the commissioners in favor of the claimants of land in the district of Kaskaskia,*' did not convey the fee to the confirmee, because, at the date of the confirmatory act, the confirmee was dead. That there was no person in *esse* to take the land at the date of the confirmation. That the act of confirmation only vested the heirs and representatives of the confirmee with an equity, and

that the fee to the land in question did not pass to them until the issue of the patent by the United States, and that the statute of limitations, prescribed by the State of Illinois, is no defence to plaintiff's action."

"But the Court refused so to construe said act of Congress, or to hold that the limitation laws of Illinois did not bar plaintiff's action.

"The Court held, as matter of law, under the foregoing facts:

"1st. That the act of Congress, approved May the 1st, 1810, passed the title of the United States, which inured to the benefit of the heirs and assignees of the confirmee, notwithstanding he was dead before the passage of the confirmatory act.

"2d. That the patent was not of itself the grant of the land by the United States, but only the evidence that a grant had been made to Francois Trottier, the patentee.

"3d. That as Jarrot went into possession of the land under claim and color of title made in good faith, and had paid all the taxes legally assessed thereon for more than seven successive years before the commencement of this suit, that it was a bar to plaintiff's action.

"4th. That if, according to plaintiff's view, the confirmatory act did not pass the title to the land in question, because the confirmee was dead, the same rule would apply to the patent issued in 1866.

"5th. The Court further held as matter of law, at the instance of defendant, that lands in the Cahokia common field, having been possessed by French inhabitants under grants or supposed grants from the government, of France from 1726, and before confirmation by Congress, and the rights and possessions of the French settlers having been guaranteed by the treaty of 1763, between France and Great Britain, and by the treaty of 1783, between Great Britain and the United States, and also by the cession of Virginia to the United States of 1787, were subject to the jurisdiction of the United States, but formed no part of the national domain in a proprietary sense of view. That the appointment of commissioners in 1804, to ascertain the claims of parties, and the subsequent survey made by the United States, reported by said commissioners, had in view to separate and segregate those ancient grants or possessions from the lands of the public domain; and that the confirmatory laws made in 1810 and 1812, are in the nature of a release, and are an estoppel to the United States as to any subsequent claim of a proprietary right in said lands, and that patents subsequently issued are merely evidence of such a release. That, as a matter of fact and history, the said lands, ever since said confirmatory acts, have become and been made taxable by the respective States wherein such claims have been found to exist, and that in the State of Illinois a mere certificate of confirmation without patent has been made evidence of title to sustain an action of ejectment by express statute."

"That the State laws as to limitation of actions are effective as to such confirmations, from the time of the confirmatory act."

To each of which propositions plaintiff excepted, and tendered his bill of exceptions.

A striking fallacy in this decision, lies in two irreconcilable points decided by the learned Judge who tried the cause, namely:

The first point is that the confirmatory act of May 1st, 1810, *passed the title* of the United States.

The fifth point decided, briefly but fairly stated, is, that *the title was never in* the United States.

If it was never in the United States, it is difficult to conceive how the act of 1810 *passed the title.*

We will now discuss the alleged errors in the order in which they appear in the record.

1st. The confirmatory act of 1810 did not pass the fee so as to let in the statute of limitations to operate as a bar to plaintiff's action because the confirmee was dead, and there was no person in *esse* capable of taking.

In other words, the report of the commissioners was that the land had been surveyed and allotted by them to Francis Trotier, *not to him, his heirs or assignees.*

At this time the well known rule of the common law, that there must not only be a grantor, but a grantee capable of taking before any valid conveyance could be made, was in force in the United States, and continued in force until the passage of the act of May 20th, 1836, above quoted, abrogating this rule of the common law.

The commissioners had no authority or power to make the location and survey in the name of a dead man, and their act in doing it was absolutely void. And the comfirmatory force of the act of May 1st, 1810, is equally inoperative to impart vitality to the void act of the commissioners, or to pass the title of the United States until the issue of the patent in pursuance of some law of the United States.

This well settled rule of the common law first came under review by this court in the case of Galt and others vs. Galloway and others, 4 Peters, 345. In that case it was held that a location made in the name of a deceased person must be considered a nullity.

The same doctrine again came under review by this court in McDonald's heirs vs. Smalley and others, 6 Peters, 261. Chief Justice Marshall delivering the opinion of the court, said: "Serious doubts exist respecting the validity of the entry under which the claim has been made, and several points have been discussed at the bar. It is unnecessary to decide more than one of these questions, because that is decisive of the case.

David Anderson, in whose name the entry under which the plaintiff's claim was made, was dead at the time. The entry therefore as was determined in Galt and others vs. Galloway 4th Peters, 332, 245, is in the State of Ohio a nullity. This being the foundation of plaintiff's title, they must fail in their action.

Counsel at the bar have endeavored to distinguish this case from that, by treating the entry as one made in the name of the wrong person, through the mistake of the surveyor.

We do not think he is sustained by the fact or the law of the case."

See Hunsford vs. Minor's heirs, 4 Bibb, 385. McCracken's heirs vs. Beall & Bowman, 3 Marsh, 210, cases involving the precise question here presented, cited and approved by this court in Galt vs. Galloway.

In Kentucky, prior to her curative act of 1792, providing that where entries had been made, or patents issued in the name of deceased persons, the title should inure to the benefit of the heirs or assignees of the deceased locator or patentee, it was held that entries and patents in the name of deceased persons were nullities.

The question here presented came before this court again in 1838, two years after the passage of the curative act of 1836, in the case of Galloway vs. Finley, et al, 12 Peters, 264, 296. In this case a military land warrant was issued to Charles Bradford, a revolutionary soldier. Bradford died in 1789. His heirs in 1793, located his military land warrant, and surveyed the land. A patent issued in 1794 for the land in the name of Bradford.

Held that a patent for lands issued after the decease of the patentee, passes no title to the lands. There must be a grantee before the grant can take effect.

Held also that the patent having issued *before* the passage of the curative act of May 20th, 1836, the title per force of that act was vested in the heirs of the deceased patentee. See page 296 of the Report.

The doctrine was again announced by this court at the December Term, 1871, in the case of Davenport vs. Lamb, 13 Wallace, 418, 427.

Justice Field in delivering the opinion of the court, says: "Neither of the patentees were living at the time the patent for the donation claim in this case was issued, Lownsdall having died in May, 1862, and Nancy having died in April, 1854.

At common law the patent would have been inoperative and void from this circumstance.

[Citing all the authorities above referred to, and one to be hereafter noticed.] Then the learned Judge proceeds, "By that law the grant to a deceased party is as ineffectual to pass the title of the grantor as if made to a fictitious person, and the rule would apply equally to grants of the government as to grants of individuals, but for the act of Congress of May 20th, 1836, which obviates this result." Then follows the act which we have already copied in our statement of the case.

The case of Thomas vs. Wyatt, 25 Mo., 26, is referred to approvingly by this court in the case last cited. Judge Ryland in delivering the opinion in this case, says: "There must be in existence some person or corporation, or body capable of taking at the time the patent issued. Nothing could pass to the patentee by virtue of a patent emanating after his death." The authorities above referred to are cited, and he quotes from the opinion of Judge Oglesby in McCracken's Heirs vs. Beall & Bowman, 3 A. K. Marsh, 210, as follows: "Indeed, we cannot imagine how it is possible for any act necessary to the acquisition of right to be done in the name of a dead person, and at the same time have

any legal operation. After the decease, the dead person has no rights, and no rights can be acquired by others in his name."

We have seen that the patent was issued in pursuance of the 7th section of the act of the 27th of April, 1816, authorizing patents to issue in all cases of confirmations to land in the Territory of Illinois.

We respectfully submit that the cases cited, as well as the obvious construction of the curative act of 1836, warrant the conviction that the latter act does not *proprio vigore* pass or operate upon the title, until after the issue of the patent. The language of the act seems clearly to negative any other construction. "*That in all cases where patents for public lands have been or may hereafter be issued*, in pursuance of any law of the United States, to a person who had died or who shall hereafter die, the title shall inure, etc."

But, to avoid the effect of the authorities cited, and the curative act of May 20, 1836, the court held that the fee to the land in question never did vest in the United States.

That the land in question being a part of the Cahokia common field, had been possessed by French inhabitants under grants, or *supposed* grants from France as early as 1726. That the title of the inhabitants had been guaranteed by the Treaty of 1763, between France and Great Britain, and by the Treaty of 1783, between the United States and Great Britain, and by the cession of Virginia to the United States in 1787.

This view of the learned Judge who tried the case, involves a more extended investigation than the case would otherwise require, in view of the numerous decisions of this court, which appear to have settled the question in accordance with the views of plaintiff. This brings us to consider.

Second.—The nature of the *supposed* French grant. In the first place there is no grant, warrant, concession or order of survey, from either the Government of France, Great Britain or Virginia, in the record, on which to predicate the judgment of the court; for this reason if none other, we apprehend, that an inquiry before this court into alleged matters or *dehors* the record will not be allowed.

But I will give a short synopsis of the legislation by Congress, indicating the policy of the Government respecting these French and British grants.

The first act is that of March 26, 1804. [See Statutes at Large, vol. 2, p. 277, § 3.] By the terms of this act, all persons claiming land within the district of Kaskaskia, under legal French and British grants, are required under penalty of forfeiture to file their claim and all evidence respecting it, with the register, under pain of forfeiture. The register is made Commissioner by this act, and clothed with summary power to hear and pass his *opinion* upon the validity of these claims, subject to rejection or confirmation by Congress.

But the powers and duties of the commission, respecting French and British grants, is greatly modified and limited in many respects, by the act of March 3, 1807, entitled "*An act to prevent settlements being made on*

lands ceded to the United States, until authorized by law." [See Statutes at Large, vol. 2, p. 445—6.]

Section 2 is in the words following:

"That any person or persons, who, before the passage of this act, had taken possession of, occupied, or made a settlement on any lands ceded or secured to the United States by any Treaty made with a foreign nation, or by a cession from any State to the United States, which lands had not been previously sold, ceded or leased by the United States; or the claim to which lands had not been previously recognized and confirmed by the United States; and who at the time of passing this act, does, or do actually, inhabit and reside on such lands, may, at any time prior to the first day of January next, apply to the proper register or recorder, as the case may be, of the land office, established for the disposal, registering or recording of such lands, or to such person or persons as may, by such registers or recorders, be appointed for the purpose of receiving such applications, stating the tract or tracts of land thus occupied, settled and inhabited by such applicant or applicants, and requesting permission to continue thereon; and it shall thereupon, be lawful for such register or recorder respectively to permit, in conformity with such instructions as may be given by the Secretary of the Treasury, with the approbation of the President of the United States, for that purpose, such applicant or applicants to remain on such tract or tracts of land, not exceeding three hundred twenty acres for each applicant, as tenants at will on such terms and conditions as shall prevent any waste or damages on such lands, and on the express condition that such applicant or applicants shall, whenever such tract or tracts of land may be sold or ceded by the United States, or whenever, for any other cause, he or they may be required under the authority of the United States, so to do, give quiet possession of such tract or tracts of land to the purchaser or purchasers, or remove altogether from the land as the case may be: *provided, however*, that such permission shall not be granted to any applicant unless he shall previously sign a declaration stating that he does not lay any claim to such tract or tracts of land, and that he does not occupy the same by virtue of any claim or pretended claim derived, or pretended to be derived from any other person or persons."

Section 3, provides "That all the applications made and provisions granted, under the preceding section, shall be duly entered in books to be kept for that purpose by the registers and recorders aforesaid, respectively."

Section 4, provides that the United States Marshal, under instructions from the President, remove from the lands aforesaid any person found on the same, who shall not have obtained permission to remain thereon as aforesaid—all settlers, prior to the passage of the act, being entitled to three months notice—all persons found on the land, after the notice given as aforesaid, shall be liable to a penalty of $100, and, on conviction, to imprisonment, at the discretion of the court, not exceeding six months.

This act applies exclusively to lands claimed under a Treaty with any foreign power, or by cession from any State; it was passed nearly three years before the Commissioners passed upon or reported upon this "supposed" French grant. It most clearly defines the policy of the United States, and as clearly limits the jurisdiction of the commission to that class of claimants, who had complied with all of the provisions of the act, by acknowledging themselves *tenants at will under the United States, and declaring, in writing, that they did not set up any claim or pretended claim o the land, except through the United States.*

Under this act of Congress, we are not at liberty to "suppose" that the claimants to lands in the common field of Cahokia, either set up a French grant or that the commission recognized any such evidence of title as against the United States.

We can not indulge such an assumption without supposing that the officers of the government disregarded their duty.

It may be asked why Congress so strongly repudiated the assumption that these "supposed" French and British grants in Illinois were valid.

On this point we are not without that authentic information which influenced the action of Congress.

Jones and Backus were the Commissioners who made the report of the 31st of December, 1809. They say that the "supposed" grant now before the court, to the inhabitants of Cahokia, was made 22d of June, 1722, by Pierre Duguet de Boisbrant, styling himself first lieutenant of the King of France for the province of Louisiana, and commandant in the Illinois, and Marc Antoine de la Loire Des Ursins, principal commissary of the Royal Company of the Indes. [See American State Papers, vol. 2, p. 196, title Public Lands—Gales & Seatons' edition.]

The Commissioners, on p. 189 of this same report, after having inquired into the validity of these French grants, say: "The whole history of Illinois goes to prove that at first, the officers of the India Company united with the officers of the Crown, and after the dissolution of said company, the officers of the French Crown alone possessed competent authority to issue concessions for land in it." * * * "We are induced to believe that during this period [between 1717 and 1731] titles were usually *commenced* by a concession from these officers; that they were then considered as in an inchoate state *dependant for their consummation, on the sanction* of the Governor General of Louisiana, the Council of the Indes, or the French Crown."

The same commissioners again report upon the nature of these supposed French and British titles, under date of Feb. 24th, 1810 [See 2d Vol. American State Papers, Title Public Lands, p. 102, Duff Green edition] as follows:

1st. *Of Ancient Grants.*

"The Commissioners are satisfied that no grants made during the continuance of the British Government in this country, either by its

officers, or by the Indian tribes, were either authorized or sanctioned by it.

The known regulations of the British Government, the proclamation of General Gage of 1773, and that of the King of Great Britian, of of the 7th of October, 1763, are, we think, decisive on this point..

With respect to the French Grants, *from the wanton outrage which has been committed on their records by the British officers and others*, it has been *rendered impossible* for the present claimants generally, either to produce the concessions to the concedes, under whom they claim, or a regular chain of conveyances from them.

Of course, in default of these proofs, we have been obliged to receive oral testimony going to prove the existence of such grants or allotments, or long and quiet possession of the tracts claimed; otherwise we should have ruined the most quiet and inoffensive part of the community."

But Congress was in possession of a large mass of information touching the invalidity of these French and British grants. The Committee on Private Land Claims, 11th Congress, second session, in their report, say *these grants and commandant deeds* or *concessions, have always been held as possessing no validity;* but that it has been provided by Congress, that where lands have been improved and cultivated under a *supposed grant* of the same by a commandant or court claiming authority to make such grant, that the person making the improvement shall be confirmed in part or whole, as the case might be, not exceeding 400 acres. [See vol. 2, Am. State Papers, title Public lands, pp. 105-6 Gales and Seatnes edition].

The inhabitants of the District of Vincennes, which adjoined the Kaskaskia District, and which was subject to the same authority during French, British and American occupation, in a communication as early as 1790 to Winthrop Sargent, then Secretary of the Northwest Territory, Acting Governor of the same, and ex-officio Commissioner to inquire into these French, British and Virginia titles, say, "As you have given verbal orders to the magistrates who formerly composed the Court of the District of Post Vincennes, under the jurisdiction of the State of Virginia, to give you their reasons for having taken upon them to grant concessions for lands within the district, in obedience thereto, we beg leave to inform you, that their principal reason is, that, since the establishment of this country, the commandants have always appeared to be vested with powers to give lands. Their founder, Mr. Vincennes, began to give concessions, and all his successors have given lands and lots.

"Mr. Legras was appointed Commandant of Post Vincennes by the Lieutenant of the county and Commander-in-Chief, John Todd, who was, in the year 1779—[it is printed 1799, but this is clearly a mistake, as the communication is dated 1790]—sent by the State of Virginia for to regulate the government of the country, and who substituted Mr. Legras with this power."

"In his absence, Mr. Legras, who was then commandant, assumed that he had, in quality of commandant, authority to give lands according to

the ancient usages of other commanders, and he verbally informed the Court of Post-Vincennes that, when they would judge it proper to give lands or lots to those who should come into the country to settle or otherwise, they might do it, and that he gave them permission to do so. These are the reasons that we acted upon, and if we have done more than we ought, it was on account of the little knowledge which we have of public affairs." [See vol. 1, American State Papers, Title Public Lands, p. 11, Duff Green's edition.]

This letter is copied by Winthrop Sargent, in his report to the Secretary of the Treasury, dated 31st July, 1790, as Commissioner of Lands. But Mr. Sargent in this report still more forcibly and clearly demonstrates the utter invalidity of these French, British, Commandant and Court grants and deeds.—he says: "The original concessions by the French and British Commandants were generally made upon small scraps of paper, which it has been customary to lodge in the notarys' office, who has seldom kept any book of record, but committed the most important land concerns to loose sheets, which, in process of time, have come into the possession of persons, that have fraudulently destroyed them, or, unacquainted with their consequence, innocently lost or trifled them away. * * In one instance, and during the government of Mr. St. Ange here, a royal notary run off with the public papers in his possession, as by a certificate produced to me, and I am very sorry to observe, that, in the office of Mr. Legrande, which continued from 1777 to 1778, and where should have been the vouchers for important land transactions, the records have been so falsified, and there is such gross fraud and forgery, as to invalidate all evidence and information which I might otherwise have acquired." [See vol. 1, Am. State Papers, Title Public Lands, Duff Green's edition, pp. 5–6.]

The report is very full and lengthy. Mr. Sargent, on page 5, says that *there is scarcely one case in twenty where the title is complete.*

A further history of these French and British titles may be found in a statement addressed by the French inhabitants of the District of Vincennes to the President, in 1793, acknowledging that they had no title to these so-called French grants, but throwing themselves on what they term the equity of the United States, thus placing themselves upon the true and only ground upon which the Government could concede any right or claim. [See vol. 1, American State Papers, Title Public Lands, p. 26, Duff Green's edition.]

President Jefferson, as early as February, 1802, in a message to the Senate and House of Representatives, called the attention of Congress to gross frauds on the public lands in the Indiana Territory, which at that time, included the Territory of Illinois under assumed authority from the State of Virginia. [See vol. 1, Am. State Papers, Title Public Lands, Duff Green's edition, p. 111.]

The title, under the most favorable view which can be taken for defendant in error, being incomplete, and at most, a mere outstanding equity in the heirs of the confirmee, from the date of the confimatory act of May

1st, 1810, until the issue of the patent by the United States in 1866, it remains for us to to consider:

Third. The jurisdiction and power of Congress in disposing of the fee. This question we respectfully submit is not open for discussion in this court at this late day.

In all cases of incomplete titles to land acquired by the United States, either by treaty, conquest or cession, the legal title vests in the United States, and it rests solely with Congress to indicate to whom the fee shall be given. Before this is done by the political department, the courts have no jurisdiction over the subject matter. Lesbois *vs.* Brant, 4 Howard, 449; McGuire *vs.* Tyler, 8 Wallace, 650; Chouteau *vs.* Eckart, 2 Howard, 344; Burgess *vs.* Gray, 16 Howard, 48.

In Menard's Heirs *vs.* Massey, 8 Howard, 293, this court held that upon the transfer of Louisiana, the United States succeeded to all the powers of the former sovereign, and could give or withhold the completion of all imperfect titles, at their pleasure. That, in order to exercise this power with discretion, Boards of Commissioners were established to enlighten the judgment of Congress; that, in all the legislation upon the subject, the claimants were never considered as possessing the legal title until the final assent of Congress was expressed in some mode or other.

In Strother *vs.* Lucas, 12 Peters, 411—448, it was held that the acts of the Commissioners, appointed under acts of Congress, to adjust and settle land titles confirmed by Congress, is conclusive upon the question of title, that it is inconsistent with all the acts of Congress, organizing Boards of Commissioners to adjust titles, and the laws which have confirmed them, to hold that the title, so confirmed, shall inure to the benfit of any person or persons but the confirmee; that it would defeat the object of these laws, were the court to hold that confirmations by the Commissioners and Congress did not operate to the benefit of the confirmee.

We come now to consider,

Fourth. The power of the States to pass laws interfering with the primary disposal of the public lands by the United States.

This question has been frequently passed upon by this court, and, we apprehend, settled.

In Bagnell *vs.* Broderick, 13 Peters, 436, it was held that Congress has the sole power to declare the dignity and effect of titles emanating from the United States; that the power of the States to enact laws operating upon the incipient title derived from the United States, is limited by the constitution, and that the States have no power to declare these equitable titles of equal dignity with a patent from the United States.

The same question was again presented in Fenn *vs.* Home, 21 Howard, 481; in which it was held that the practice in some of the States to allow actions of ejectment to be maintained upon equitable titles, can not affect the jurisdiction of Federal Courts.

In Wilcox *vs.* Jackson, 13 Peters, 498, it was held that the act of the

legislature of Illinois, giving the right to the holder of a registered certificate of entry of public lands, to recover possession in an action of ejectment, does not apply to cases where a paramount title to the land is in defendant, holding under a patent from the United States. That the power of the States to prescribe remedies in their own courts, and to regulate the disposition of property by descent, devise, or alienation, does not extend to cases where the legal title is in the United States; that, when a patent has not issued for a part of the public lands, a State has no power to declare any title, less than a patent, valid against a claim of the United States to the land, or against a title held under a patent granted by the United States. That whenever the question presented in any court, State or Federal, is, whether the title to property which had belonged to the United States has passed, that question must be resolved by the laws of the United States.

The recent case of Gibson *vs.* Chouteau, 13 Wallace, 92, decides the question fully. In that case, this court held that the occupation of lands derived from the United States, before the issue of their patent, for the period prescribed by the limitation laws of a State, is no bar to an action of ejectment for the possession of such lands, founded upon the legal title subsequently conveyed by the patent. That the power of Congress, in the disposal of the public domain, can not be interfered with, or its exercise embarrassed by any State legislation. That the grantees of the United States can not be deprived of the enjoyment of the property by reason of any delay in the transfer of the title after the initiation of steps for its acquisition.

For these reasons, we ask that the judgment of the court below be reversed.

Albert Rice

~~JOHN HALLUM,~~

Attorney for Plaintiff in error.

Supreme Court of the United States.

OCTOBER TERM 1873.

JONATHAN CREWS, *Plaintiff in error.*

vs.

ISAAC N. BREWER, *Defendant in error.*

Writ of Error from Circuit Court of the United States, for the Southern District of Illinois.

BRIEF AND ARGUMENT

OF

GUSTAVUS KOERNER,

COUNSEL FOR

Defendant in error.

BELLLEVILE, ILL.

"STERN DES WESTENS" STEAM PRINTING ESTABLISHMENT.

1873.

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DEFENDANT'S BRIEF.

I.

The tract in question is a distinct part of the Common Fields of the village of Cahokia.

Illinois was ceded by France to England by the Treaty of 1763, and by England to the United States by the Treaty of 1783. In the Treaty of 1763 England undertook to protect the rights and possession of the former subjects of France. General Gage, on December 30th, 1764, in the name of the King issued his proclamation wherein amongst other things it was made known "that

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theFrench inhabitants and others, who chose to retain their lands and to become subjects of his Majesty should enjoy the same rights and privileges, the same security for their persons and effects, and liberty of trade, as the old subjects of the King."

Virginia and other States claiming under their charters to the Mississippi River, and Virginia in particular having claimed the Illinois Country by conquest by her own troops, under G. Rogers Clark ceded these claims to the United States, New York by Deed of Cession, March 1st, 1781, Virginia by the Act of Cession, October 20th, 1783, Massachusetts by Act of Cession, April 19th, 1785, Connecticut May 30th, 1800.

The Deed of Cession from Virginia contained the following clause: "That the French and Canadian inhabitants and other settlers of the Kaskaskias, St. Vincents and the neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles *affirmed* to them and be protected in the enjoyment of their rights and liberties."

The Common Fields of Cahokia were an ancient French Grant. See Report of Michael Jones & E. Backus, wherein it is said:

"A tract of four leagues of land square, as expressed in the grant of 22d day of June, 1722, was granted to the Missionaries of Cahokia and Tamarois, who seem to have been under the control of the Bishop of Quebeck, by Pierre Dueguet de Boisbriant, First Lieutenant of the King of France for the Province of Louisiana and commandant in the Illinois, and Marc-Antoine de la Loire des Ursins, Principal Commissary of the Royal Commission of the Indies (see United States Register Book of Translations, p. 208), bounded on the west by the Mississippi, including the adjacent Islands, beginning a quarter of a league above the little river of Cahokia and extending south and east for quantity."

This grant was in fee simple and *from it* have emanated the titles to the land, which form the subject of this report.

"ON THE COMMON FIELD."

"This tract, as will be seen by the plat and list of claims annexed, is composed of the various grants or allottments made to the several inhabitants of these villages, *and from the first has been enclosed by a common fence.* The original boundaries of this tract have been found by the present surveyor; and there seems to be no dispute between the individuals claiming here about their titles or their boundaries."

II. Vol. State Papers, Public Lands, p. 199.

See also plat accompanying it of the separate surveys or claims by the old French inhabitants, of which the tract in question will be found to be one.

See also a very full and interesting history of these titles in 27 Ill., p. 453. Herbert *vs.* Lavalle.

See also as explanatory of those titles Report of Committee of Congress, of June 20th, 1788, Story's Edit. of Laws of the United States. Vol. I., pages 580 & 582.

Also Law of Congress, March 3d, 1791. Statutes at large, Vol. I., 221.

Now we hold *that the United States never had any title to the land in question.* It has been the fundamental policy of the United States, independent even of Treaty obligations, to never interfere with the proprietary rights of the former citizens or inhabitants of a new contry, acquired either by treaty or conquest. This Court has so decided in numerous instances. — Now those Common Field Surveys in question were not mere claims to some certain quantity of land from general grants of land *not located*; but the Common Field was actually allotted to the inhabitants, and enclosed with a common fence, according to the custom prevailing at that time in France,

in Spain and other countries of the European Continent, and in that field each inhabitant had in severalty a tract of arable land allotted to him, which passed to his heirs or legal representatives, and does so now, which was marked by stones on the corners, which are in fact yet in existence.

See Bowman *vs.* Wider, 39 Ill. p. 420.

This is the view which has been taken by the Supreme Court of Illinois,

Breese's Reports, N. Edition, p. 304, Doe *ex. dem vs.* Hill et al.

33 Ill., p. 433, Reichert *vs.* Felps, which last decision was affirmed by this Court.

6 Wallace, same case.

Herbert *vs.* Lavalle, above cited, where the Court say: "On this grant (to the Missionaries of Caokias and Tamarois) documentary evidence presented by counsel in the argument of the case, shows, that a village was established and village lots granted (also tracts in the Common Field, which the Court do no mention, as not being in question in the case). On the explosion of the Company of the West, on the 10th of April, 1732, their power and privileges reverted to the Crown, from which thereafter emanated all grants of land. In August 1743 this grant, made in 1722, was recognised by the French Government through Monsieur Vaudrieul, then Governor, and Jalmon, Commissary of the Province of Louisiana."

Speaking of the confirmatory act of 1810, the Court proceed to say: "This is an operative grant of all the interest the United States may at any time have had in the land described in the transcript of the Commons and confirms the land in terms to the inhabitants of these villages respectively."

See also 5 Wallace, 326, Townsen *vs.* Greeley.

2 Wallace, 204, Lanfear *vs.* Hanley.

When the United States became the Territorial Sovereign of Illinois, the title to the land in question had passed out of the former (French) Government to private individuals, and no confirmation of the title was in fact needed.

The Supreme Court of Illinois say in the case of Doe *ex dem vs.* Hill, "that it was to allay any fears on the part of the French settlers, that their possessions and titles might be interfered with, and not recognised by Congress, that Virginia required the confirmation of their titles from the United States, and that to effect so desirable an object could best have been effected by a deed of confirmation or patent, *releasing* the interest of the United States.....These confirmations were to be a benefit to the United States as well as to the settlers, for by the settlers surveying their lands and exhibiting their claims, the United States became apprised of the extent of their claims, and were thus enabled to ascertain what land remained to them. It was a *convenient mode of dividing the land of individuals from the lands of the nation.*" — And after giving a definition of a confirmation at common law, the Court proceed: "Upon this definition of a confirmation the confirmer would not be permited to deny the pre-existing estate of the confirmee."

If we are correct in this view of the case, we may leave out of view the effect of a confirmation by an Act of Congress as to a patent afterwards issued, and a case is made out for the defendant whose actual possession for more than forty years claiming adversely would defeat any title of the plaintiff.

II.

No patent was required in the present case. The confirmatory acts of 1810 and 1812 above cited are not prospective requiring the claimants to have their claims located, surveyed and returned to the proper officers, whereupon they should be entitled to a patent. Numerous such acts have been passed by Congress, for instance the act of Congress, approved March, 1807, II. Volume, Statutes at large, p. 446, entitled "*An Act confirming claims to land in the District of Vincennes*," the fifth section of which provides that "any person or the legal representative of any person whose claim to a tract of land is confirmed by this act, and who had not previously obtained a patent for the same from the Governor either of the Territory northwest of the Ohio, or of the Indiana territory, shall whenever his claim *shall have been located and surveyed* be entitled to receive a certificate from the Register of the Land Office at Vincennes, stating that the claimant is entitled to receive a patent for such tract of land by virtue of this act, and which certificate shall entitle the party to a patent."

Now in such a case it might be plausibly argued perhaps, that the confirmatory act did not divest the Government of its title, and that a patent was necessary to effect such divestment. We do not think so, and the Circuit Court for the Southern District of Illinois (Judges Drummond and Treat) decided at the January Term, 1873, in the case of *Langdeau vs. Hanes*, which we understand is now before the Supreme Court on writ of error at the present term, that the confirmatory act conveyed or rather released the title of the United States, and a subsequent patent was not required.

In the present case the location and survey had taken place in 1809, and the survey had been returned to be confirmed.

See p. 194 Vol. II. American State Papers.

Nothing remained to be done by the claimant, when the confirmatory acts were passed, and those acts do not even provide for the obtaining of a patent. But even if they had, such a provision would have made it only optional with the claimant to apply for a patent. That an act of Congress conveying title or confirming claims is tantamount or even paramount to a patent is a proposition, which at this late day ought hardly to be questioned. We will confine ourselves to refering some out of the very numerous authorities on that point:

12 Ill., p. 326, Ballance *vs.* Tesson.

34 Ill., p. 395, Dart *vs.* Hercules.

33 Ill., p. 433, Reichardt *vs.* Felps.

12 Pet., p. 410, Stoddard *vs.* Chambers.

2 How., p. 399, Chouteau *vs.* Eckhard.

9 Missouri, 326.

10 ibid, 763.

7 ibid, 98.

11 ibid, 167.

12 ibid, 19.

A grant may be made as well as by resolve as by deed.

1 McAllister, 401, California Circuit Reports, Mezes *vs.* Greer.

Confirmation to an equitable title to land by Congress, is the highest evidence of title, and is higher than a patent.

2 Howard, p. 319, Grignon *vs.* Astor.

An act of Congress confirming claims neither en-

larges nor diminishes what the original grant gave. It extinguishes all claims on the part of the United States on the land covered by the surveys.

4 Wallace, 204 Lanfear *vs.* Hanley.

9 Miss., 326, Harvold *vs.* Limer.

15 Miss., 80, McGill *vs.* Somer.

Vol. IX Opinions of Attorney General, p. 253.

A grant of land may be effectually made without intervention of patent.

If the plaintiff is right in his proposition, then surely the Judiciary of Illinois, the whole bar and the Legislature have been in error for the last 60 or 70 years, for they have been under the impression, that the title, if the United States ever had any, passed out of them by the confirmatory act of 1810. — It was some six years before an act of Congress was passed providing a mode of obtaining patents for those lands heretofore confirmed.

See law cited by plaintiff, Statutes at large, Vol. III, p. 307, and that law applied to cases, *wherein the location and survey had not taken place before the confirmatory act*, and did not even provide for such cases as the present. And that law left it optional for the claimant. It was not before the act of December 22d, 1854 (X. Stat. at large, 599), that a very carefully guarded general law passed by which patents in a case like the present could have been issued if desired. It provides that in case of any claim to land in any State or Territory which has heretofore been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of patents (which is the case in the statutes of 1810 and 1812, confirming claims in the Kaskaskia Land District), it shall and may be lawful where surveys for the land *have been made* or may hereafter be made,

to issue patents for the claims so confirmed, etc., etc. *Provided that such patents shall only operate as a relinquishment of title on the part of the United States, and shall by no means interfere with any valid adverse right, if such exist to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land.*

"We state," as the Court below declared, "as a matter of fact and history that the said lands, ever since the said confirmatory acts, have become and been made taxable by the respective States wherein such claims have been found to exist, and that in the State of Illinois a mere certificate of confirmation without patent has been made evidence of title to sustain an action of ejectment by express statute."

Perhaps the latter part of the sentence might be better qualified by stating, that the Statute of Illinois allows a certificate of the Register or Receiver of the Land Office certifying to any fact or matter on record in his office to be received in evidence and competent to prove the fact so certified. Under this statute in all actions where the title to any of these confirmations came in question it was proved by the certificate of the Register, that it appeared on record in his office that the claim and survey in dispute was found on the original report of the Commissioners, recommended to be confirmed, whereupon the confirmatory law was applied by the Court. The certificate of the Register was only preliminary proof. The law gave the title, the same as a patent. Since the publication of the State Papers, the printed lists and records were resorted to for the preliminary proof; the confirmatory law was ap-

plied as completing with the original grant, or the original laws granting certain quantity of lands, the legal title of the confirmee.

The Statute of limitation under the 20 years adverse possession, also that under the 7 years possession and payment of taxes was freely and in almost every case applied by the Courts, and the question never raised within the last sixty years as to the legal title having remained or not in the United States, after the confirmatory acts, even to such tracts which had been granted by certain unlocated quantities to settlers or militia men or other persons by laws of Congress. All those lands have been uniformly taxed, though in but few cases only patents have been issued, and they within comparatively late periods, as a convenience to owners more than anything else. The patent under which plaintiff claims, was issued only in 1866 on the application of the plaintiff who is, as it appears from the number of suits he has commenced, an extensive collector and amateur of ancient French titles.

Most of these surveys are very valuable, some as those opposite St. Louis of immense value, and they cover very large tracts of land in the older part of the State in the Counties on and near the Mississippi and the Wabash Rivers. Now if the legal title remained in the United States until patents were issued, they could never have been taxed by the State, and yet they were so taxed from time almost immemorial, and no pretense that they should not be was ever set up. It is easy to imagine where such a doctrine would have led to, but we forbear to dwell longer on a point which seems almost to be self evident.

III.

It may be that the person under whom the *plaintiff* claims, was dead, when the confirmatory act passed, as he died in 1803. The Francois Trottier, under whom the *defendant* claims, *was not dead*. There is no proof that the Francois Trottier, whom the patent intended, was the Francois Trottier who died in 1803. The presumption is against it. The Board of Commissioners was only appointed in 1804, Act of March 26, Story's Statutes, V. III, pag. 596, and so the plaintiff's Francois Trottier could not have made a claim before them, which was to be made at the 1st of November, 1805, nor could he have had a survey made for him before 1809. — The record does not *prove* the identity of the plaintiff's Trottier with the one intented by the patent. Ms. Jarrot's testimony shows that the Francois Trottier under whom *defendant* claims, was living when Nicolas Jarrot took possession of the land, and resided on part of it after sale. Vital Jarrot's testimony is to the same effect. Brewer is only tenant of the Jarrots.

III.

But entering upon the order of plaintiff's ideas and supposing that his Francois Trottier was intended to be the confirmee in the first instance and the patentee afterwards, does not the remedial act of 1836, vest the legal title in those who were the representatives, at the time of his death, and from that time on, in other words, is it not the obvious intention of the Statute to relate back to the time the original claimant died? According to legal principles it must be so. It is contended that a grant to a dead man is void. But why?

Because there is no grantee at the time of the grant. Patents or grants to a dead man are applied by this remedial Statute for the benefit of the heirs, devisees or assignees of such deceased patentee. Now as there was no kind of estate in them, either legal or equitable, nothing could enure to them, because nothing can enure to one who has no particle of interest in the thing which is to enure. The law then proceeds upon a fiction, that is to say, it looks upon the patent as having issued, as it might have been issued before the death of the original claimant, and by this fiction and relation back invest the heirs, or assigns with the estate. The law by relation makes the ancestor take in his life time, and his legal representatives take upon his death. Against the legal title so obtained by the legal representatives the defendant has a right to set up his adverse peaceable possession for nearly sixty years with color of title or even without, and his seven years possession and color of title and payment of taxes under the limitation laws of Illinois. This seems to be very clear by the language of the law itself, which says, "*the title to the land designated therein shall enure to and become vested in the heirs, devisees or assigns of such deceased patentee, as if the patent had issued to the deceased person.*"

Another view may also be taken of this remedial act, and it is this. A patent like a deed is not the grant of the thing itself, but merely the evidence of it. The patent may be void, yet the title remains. It may not be what we in our traditional and artificial jurisprudence call a legal title, and may require remedial legislation as in this case to make it a legal title. — Now in this law the word *patentee* is used. Does it not come most strictly within the spirit of the law to say that it equally should

apply to one whose grant was effected by an Act of the Legislature? We have seen before, that there are two modes by which the Government passes a fee, that is by patent which is evidence of a contract of sale or other transfer between patentee and Government, or by a *resolve* or *legislative* act. Admit then that the Confirmatory Act was in the nature of a grant, and was void as to Francois Trottier, as he had died before the act was passed, does not the act of 1836 embrace his case as well? Is there a difference in any respect between a patentee and a confirmee or a grantee by law. So then by the law, as we contend, Trottier's heirs and assignees took the legal estate from the time of the passage of the act of 1836, and the Limitation Laws would apply with the same force, even if we do not refer the legal title as far back as the confirmatory law, or the death of the ancestor. It seems to us that if the heirs and assignees, if a patent had been issued after the death of Trottier and before the passage of the remedial act, could have claimed the legal title under the act, they have the same right to claim it, if instead of a patent, Trottier's title was confirmed by law.

The patent under which the plaintiff claims sets out the confirmation and refers to it, and under the law of 1854, X. Statutes at large, p. 593, heretofore referred to, this patent only operates as a relinquishment of the title in United States, and is not to interfere with any valid adverse right.

We believe that we have established the two principal propositions in this case:

1st. That the United States never had any territorial title over the land in question, and that it was individual

property at the time of our treaty with England of 1783, and of the cessions from the varions States.

2d, That if the United States had territorial title, it has passed it by the confirmatory acts of 1810 & 1812.

Just at the completion of this our brief and argument we were placed in possession of the proof sheets of the plaintiff's brief and arguments, and in conclusion we will briefly comment upon it, though we believe we have in the main anticipated, and we hope succesfully proved his views to be untenable.

This Court has decided the American State Papers to be evidence and the Report of the Commissioners, appointed to examine into the land titles in the Kaskaskia District shows the evidence of this grant by the French Government. Besides it needed no *grants* under the law. If those ancient settlers were found in possession of lands under a *supposed* grant, as the law expressly provided, they were to be confirmed in those *possessions*. The Supreme Court of Illinois has however settled the question as to this grant.

(Lavalle *vs.* Hebert, above cited.)

The plaintiff entirely mistakes the object and purport of the law of March 3d, 1807, cited by him, entitled "An Act to prevent *settlements being made* on lands ceded to the United States. This is one of the many acts against *squatters*, and has nothing at all to do with the present case. It refers *to those who have not settled prior to the passage of the act*, and it gives to such squatters a tenancy at will, and they must expressly declare that they have *no claim to the land*, and do not occupy it by virtue of any claim or pretended claim derived or pretended to be derived from any other person.

We are not disposed to follow the plaintiff into the various comments made by Committees of Congress or by Presidents or Commisioners on the nature of these ancient claims. They have been passed upon by the Judiciary of the States in which they occur and have been taken out of the domain of mere *historical* disquisition.

We do not deny the plaintiff's position that as to incomplete or mere inchoate titles to lands before acquisition by the United States, the fee remains in the United States, and cannot be passed except by law, or by patent, under a law directing patents to be made in certain cases.

The case principally relied upon by plaintiff in error in the Court below and also referred to here, as conclusive, Gibson *vs.* Chouteau, 13 Wall. 92, is not in point. While the New Madrid claims were ancient claims, the fee of which was vested in the owners of those lands, it does not follow, that upon the destruction of those lands, other lands *out of the public domain*, the title of which was indisputably in the United States, given in lieu of the lands destroyed, by virtue of the act of donation, passed to the former owners of the New Madrid lands, because the title to the latter had passed previously out of the United States. That act was an act granting merely a right to locate claims on the public domain wherever the claimants pleased, and required evidence of location and survey, and filing such evidence and survey in the proper offices, whereupon they became entitled to a patent. Those titles then were inchoate and incomplete, and required action of the claimant as well as of the Government before they could become complete.

The present case is of great importance. Perhaps not one of the original confirmees, or even their descendants are in possession of those ancient French grants. The conveyances made by them at an early day are either lost, were not recorded, and are indefinite in their description in most cases. Nearly all the present owners have to rely on possession. If that should prove unavailing, and the heirs of the old confirmees should now sue, or sell their claims for trifles to speculators as is usually the case, there would be in this section of the Country a most fatal unsettlement of titles and property to a very large amonnt, in every case where patents were not issued early enough to allow the statute of limitation to be interposed. But we are confident that this Court will approve the decision of the Circuit Court below (Judges Davis and Treat) and affirm their Judgment.

GUSTAVUS KOERNER,
for defendant in error.